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[1944] King's Bench

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1944

THE
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KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL,

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

◆

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Abbey National Building Society, Signy *v.* 449
Adams *v.* Naylor 750
Ahlquist Bros., Ld., Hocking *v.* 120
Alexander *v.* Tredegar Iron & Coal Co. 390
Allen *v.* Emerson 362
American Cyanamid, &c., Corporation, Geo. Monro, Ld. *v.* 432
Anglo-Eastern Trading & Industrial Co., Bishop & Baxter, Ld. *v.* 12
Arabian *v.* Tufnall & Taylor, Ld. 685
Asher *v.* London Film Productions, Ld. 133
Ashworth *v.* McGuirk (J.) & Co. 1
Associated Cinema Properties, Ld. *v.* Hampstead Borough Council 49, 412
Athel Line, Ld. *v.* Liverpool & London War Risks Association 87
Attorney-General *v.* Daimler Co., Ld. 239
Attorney-General *v.* Randall 709
Austin *v.* Greengrass 399

B.

Barnes Corporation, Conqueror Property Trust, Ld. *v.* 96
Barnwell, Everall *v.* 333
Bedfordshire County Council, Drake *v.* 620
Bellotti, Minister of Health *v.* 298
Bents Brewery Co. *v.* Upper Agbrigg Assessment Committee 524
Bishop & Baxter, Ld. *v.* Anglo-Eastern Trading & Industrial Co. 12
Blackburn, Knott *v.* 77
Blundells & Crompton & Co., Lovell *v.* 502
Blyth, Ex parte 532
Board of Trade, Paprika, Ld. *v.* 327
Boothman (Wm.) & Sons, Miller *v.* 337
Bowater *v.* Rowley Regis Corporation 476
Bristol Aeroplane Co., Young *v.* 718
British Doughnut Co. *v.* Dale 228
British Doughnut Co., Evans *v.* 102
Broughton *v.* Whittaker 269
Brown *v.* Draper 309
Brown *v.* Stafford 193
Bryanston Property Co. *v.* Edwards 32
Burns, Sutch *v.* 406
Butler, Capital & Counties Properties, Ld. *v.* 730
Butt, Harman *v.* 491

C.

Callaghan *v.* Fred Kidd & Son (Engineers), Ld. 560
Canterbury (Archbishop), Rex *v.* Ex parte Morant 282
Capital & Counties Properties, Ld. *v.* Butler 730

PAGE

Carr, Land Settlement Association, Ld. *v.* – – – 657
Carters (Merchants), Ld., Clark (Jas.) (Brush Materials), Ld. *v.* 566
Champ, Concentrated Foods, Ld. *v.* – – – – 342
Chantler, Lace *v.* – – – 368
Chesterton R.D.C. *v.* Ralph Thompson, Ld. – – – 447
Clark, Halsted *v.* – – – 250
Clark (Jas.) (Brush Materials), Ld. *v.* Carters (Merchants), Ld. – – – – – 566
Concentrated Foods, Ld. *v.* Champ – – – – 342
Conqueror Property Trust, Ld. *v.* Barnes Corporation – – 96
Constantine *v.* Imperial Hotels, Ld. – – – – – 693
Croft, Rex *v.* – – – – 295
Cummins *v.* Holloway Bros. (London), Ld. – – – 323
Cunningham-Reid *v.* Public Trustee – – – – 602

D.

Daimler Co., Ld., Attorney-General *v.* – – – – 239
Dale, British Doughnut Co. *v.* – 228
Danziger *v.* Thompson – – 654
Derby (Recorder), Rex v. Ex parte Spalton – – – 611
Dickinson *v.* St. Aubyn – 10, 454
Director of Public Prosecutions *v.* Kent & Sussex Contractors, Ld. – – – – – 146
Docker, Stray *v.* – – – 351
Drake *v.* Bedfordshire County Council – – – – 620
Draper, Brown *v.* – – – 309
Dudley *v.* Dudley – – – 264
Duncan, Rex *v.* – – – 713

E.

Easson *v.* L. N. E. Ry. – – 421
Edwards, Bryanson Property Co. *v.* – – – – 32
Elliott (Geo.) & Co., Holman *v.* 591
Emerson, Allen *v.* – – – 362

PAGE

Essex Rivers Catchment Board, Port of London Authority *v.* 512
Evans *v.* British Doughnut Co. 102
Evans & Evans, In re Affairs of 373
Evans, Jones *v.* – – – 582
Everall *v.* Barnwell – – 333

F.

Field *v.* Gover – – – 200
Field *v.* Hopkinson – – 42
Fisher's Foils, Ld., Jackson *v.* – 316
Fitzgerald *v.* Inland Revenue Commissioners – – – 668
Foreign Bondholders Corporation *v.* Inland Revenue Commissioners – – – 63, 403

G.

Garston Haulage Co., Ware *v.* – 30
Garvin *v.* London (City) Police Authority – – – – 358
Gilroy, Hardwicke *v.* – – 460
Goodwin, Rex *v.* – – – 518
Gover, Field *v.* – – – 200
Greengrass, Austin *v.* – – 399

H.

Haddy, Rex *v.* – – – 442
Hadfields, Ld., Holmes *v.* – 275
Halsted *v.* Clark – – – 250
Hampstead Borough Council, Associated Cinema Properties, Ld. *v.* – – – 49, 412
Hardwicke *v.* Gilroy – – 460
Harman *v.* Butt – – – 491
Hastings Corporation, Woodward *v.* – – – – 671
Henshaw (Joshua) & Son *v.* Rochdale Corporation – – 381
Hill (W.) & Son *v.* Tannerhill – 472
Hind, Hollyhomes *v.* – – 571
Hirst (Geo. H.) & Co., Leavey (J.) & Co. *v.* – – – 24
Hocking *v.* Ahlquist Bros., Ld. – 120
Hollington, Watkinson *v.* – 16
Holloway Bros. (London), Ld., Cummins *v.* – – – 323
Hollyhomes *v.* Hind – – 571
Holman *v.* Geo. Elliott & Co. – 591
Holmes *v.* Hadfields, Ld. – – 275

PAGE
Hopkinson, Field *v.* – – 42
Houndsditch Warehouse Co. *v.* Waltex, Ld. – – – 579
Huntbach, Rex *v.* Ex parte Lockley – – – – 606

I.

I. C. R. Haulage, Ld., Rex *v.* – 551
Imperial Hotels, Ld., Constantine *v.* – – – – 693
Ingall *v.* Moran – – – 160
Inland Revenue Commissioners, Fitzgerald *v.* – – – 668
Inland Revenue Commissioners, Foreign Bondholders Corporation *v.* – – – 63, 403
Inland Revenue Commissioners, Mauray *v.* – – – – 545
Inland Revenue Commissioners, Stanley *v.* – – – – 255

J.

Jackson *v.* Fisher's Foils, Ld. – 316
Jacobs, Rex *v.* – – – 417
Jewelowski *v.* Propp – – 510
Jones *v.* Evans – – – 582
Jones (M.) & Son, Lomas *v.* – 4

K.

Kennedy *v.* Walker – – 225
Kent and Sussex Contractors, Ld., Director of Public Prosecutions *v.* – – – – 146
Kidd (Fred) & Son (Engineers), Ld., Callaghan *v.* – – 560
Kirby, In re Affairs of – – 213
Knott *v.* Blackburn – – 77

L.

Lace *v.* Chantler – – – 368
Land Settlement Association, Ld. *v.* Carr – – – 657
Larrinaga Steamship Co. *v.* Regem – – – – 124
Leavey (J.) & Co. *v.* Geo. H. Hirst & Co. – – – 24
Leckey, Rex *v.* – – – 80
Lincoln Justices, Rex *v.* Ex parte Trafford – – – 243

PAGE
Liverpool & London War Risks Association, Athel Line, Ld. *v.* 87
Lomas *v.* Jones (M.) & Son – 4
London (City) Police Authority, Garvin *v.* – – – – 358
London Film Productions, Ld., Asher *v.* – – – – 133
London & N. E. Ry, Easson *v.* 421
Love *v.* Norman Wright (Builders), Ld. – – – 484
Lovell *v.* Blundells & Crompton & Co. – – – – 502
Lubovsky *v.* Snelling – – 44

M.

McGuirk (J.) & Co., Ashworth *v.* 1
Maitland *v.* Raisbeck & R. T. & J. Hewitt, Ld. – – – 689
Marsh *v.* Police Commissioner – 99
Martin, Vickery *v.* – – – 679
Mauray *v.* Inland Revenue Commissioners – – – 545
Miller *v.* Ottilie (Owners) – – 188
Miller, Winchester Court, Ld. *v.* 734
Miller *v.* Wm. Boothman & Sons – – – – – 337
Minister of Health *v.* Bellotti – 298
Moran, Ingall *v.* – – – 160
Monro (George), Ld. *v.* American Cyanamid, &c., Corporation – 432

N.

Naylor, Adams *v.* – – – 750
No-Nail Boxes, Ld., No-Nail Cases Proprietary, Ld. *v.* – 629
No-Nail Cases Proprietary, Ld. *v.* No-Nail Boxes, Ld. – – 629

O.

Oliver, Rex *v.* – – – 68
Ottilie (Owners), Miller *v.* – 188

P.

Paprika, Ld. *v.* Board of Trade 327
Park, Thompson *v.* – – 408
Police Commissioner, Marsh *v.* 99
Pontypridd Assessment Committee, Simmonds Aerocessories *v.* – – – – 231

PAGE
Port of London Authority *v.* Essex Rivers Catchment Board – – – – 512
Propp, Jewelowski *v.* – – 510
Public Trustee, Cunningham-Reid *v.* – – – – 602

R.

Raisbeck & R. T. & J. Hewitt, Ld., Maitland *v.* – – 689
Randall, Attorney-General *v.* – 709
Regem, Larrinaga Steamship Co. *v.* – – – – 124
Rex *v.* Canterbury (Archbishop). Ex parte Morant – – 282
Rex *v.* Croft – – – – 295
Rex *v.* Derby (Recorder). Ex parte Spalton – – – 611
Rex *v.* Duncan – – – 713
Rex *v.* Goodwin – – – 518
Rex *v.* Haddy – – – 442
Rex *v.* Huntbach. Ex parte Lockley – – – – 606
Rex *v.* I. C. R. Haulage, Ld. – 551
Rex *v.* Jacobs – – – 417
Rex *v.* Leckey – – – 80
Rex *v.* Lincoln Justices. Ex parte Trafford – – – 243
Rex *v.* Oliver – – – 68
Rex *v.* Turner – – – 463
Rex *v.* Woodward – – – 118
Richmond Court, Ld., White *v.* 576
Roberts, Summers *v.* – – 106
Rochdale Corporation, Joshua Henshaw & Son *v.* – – 381
Rodwell *v.* Thomas – – 596
Rowley Regis Corporation, Bowater *v.* – – – – 476

S.

St. Aubyn, Dickinson *v.* – 10, 454
Signy *v.* Abbey National Building Society – – – 449
Simmonds Aerocessories (Western), Ld. *v.* Pontypridd Assessment Committee – 231
Smith (D. S.), In re Affairs of – 142
Snelling, Lubovsky v. – – 44
Solicitor, A., In re – – – 427
Southgate Borough Council *v.* Watson – – – – 541

PAGE
Stafford, Brown *v.* – – – 193
Stanley *v.* Inland Revenue Commissioners – – – – 255
Stray *v.* Docker – – – 351
Summers *v.* Roberts – – 106
Sutch *v.* Burns – – – 406

T.

Tannerhill, W. Hill & Son *v.* – 472
Tedman *v.* Whicker – – 112
Thomas, Rodwell *v.* – – 596
Thompson, Danziger *v.* – – 654
Thompson *v.* Park – – 408
Thompson (Ralph), Ld., Chesterton R.D.C. *v.* – – – 447
Tredegar Iron & Coal Co., Alexander *v.* – – – – 390
Tufnall & Taylor, Ld., Arabian *v.* – – – – – 685
Turner, Rex *v.* – – – 463

U.

Upper Agbrigg Assessment Committee, Bents Brewery Co. *v.* – – – – 524

V.

Vickery *v.* Martin – – – 679

W.

Walker, In re Decision of 173, 644
Walker, Kennedy *v.* – – 225
Waltex, Ld., Houndsditch Warehouse Co. *v.* – – 579
Ware *v.* Garston Haulage Co. – 30
Watkinson *v.* Hollington – – 16
Watson, Southgate Borough Council *v.* – – – 541
Whicker, Tedman *v.* – – 112
White *v.* Richmond Court, Ld. 576
Whittaker, Broughton *v.* – 269
Winchester Court, Ld. *v.* Miller 734
Woodward *v.* Hastings Corporation – – – – – 671
Woodward, Rex *v.* – – – 118
Wright (Norman) (Builders), Ld., Love *v.* – – – 484

Y.

Young *v.* Bristol Aeroplane Co. 718

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

ASHWORTH *v.* J. McGUIRK & COMPANY LIMITED.

C. A.

1943
Sept. 29.

Factory Acts—Dock—Dangerous process—Employment of signaller—Breach of duty—Docks Regulations, 1934 (*St. R. & O.*, 1934, *No.* 279), *reg.* 43.

The obligation to employ a signaller during certain processes of unloading ships which is imposed by reg. 43 of the Docks Regulations, 1934, is not complied with by the mere contractual appointment of a man to act as signaller. The regulation contemplates that the signaller must be present whenever any act of unloading takes place, and, therefore, if a workman is injured during the temporary absence of the signaller, his employer is liable for breach of statutory duty.

APPEAL from Liverpool Court of Passage.

On November 30, 1941, the plaintiff, Samuel Richard Ashworth, who was employed by the defendants, J. McGuirk & Co., Ld., as a dock labourer, was engaged in unloading sacks of rice from a ship, his duty being to receive the sacks from a sling on a " stool " or platform on the quay and to hand them to

C. A.

1943

ASHWORTH
v.
J. McGUIRK
& Co. LD.

another man for removal. Each sling carried ten sacks. It was dangerous for a sling to be sent over until the stool was cleared of sacks previously placed on it, and it was the duty of a "railman" or signaller on the ship's deck to watch the clearance of the stool and signal to the craneman when it was safe to send over a sling. While the plaintiff was working with his back to the ship he was struck by a sling and received injuries. At the time of the accident the railman had left his post to get refreshment. The plaintiff sued the defendants for breach of the statutory duty imposed on them by reg. 43 of the Docks Regulations, 1934 (1). The judge of the Liverpool Court of Passage found as follows: "I am not satisfied that the "railman or a deputy was present when the sling in question "came over, but on consideration of the evidence I find that "the defendants did on this day and for the purpose of the "process employ a man or men whose duty was to signal to "the craneman to hoist the slings, and I am not prepared to "hold that the defendants committed a breach of reg. 43." He entered judgment for the defendants, and the plaintiff appealed.

Wooll K.C. and *Pappworth* for the plaintiff. The obligation under the regulation is an absolute obligation to have a signaller actually at work whenever cargo is being unloaded. The word "employed" here means "working," not merely "engaged" or "appointed."

H. I. Nelson for the defendants. The word "employed" is ambiguous. The onus was on the plaintiff to prove that no signaller was employed, but the judgment amounts to a finding that he had not made out his case, and the judge was entitled so to find.

LORD GREENE M.R. The judge, basin himself on findings of fact which are not subject to criticism, held that no breach of reg. 43 had been committed. He construed the regulation as meaning that the obligation imposed by it would be discharged if a man was under a contract of employment to do the work indicated in the regulation, whether or not at any given moment he was present on the job. That construction appears to me to be much too narrow. I do not read the words " shall be employed " as meaning merely that the duty of the employer is to engage a man to do the work in question. In my opinion, the obligation imposed on the employer by this regulation cannot be discharged unless during the time when each act of loading or unloading is taking place there is present on the job a duly qualified and properly instructed signaller. The conception of a continuous and absolute obligation on employers under statutory safety regulations is common. It is familiar, for instance, in the case of the fencing of machinery, and I cannot see why a narrow construction should be put on the regulation so as to absolve the employer from all liability if he has contracted with somebody to do the work merely because the precautions which the regulation requires to be taken involve a human, as distinct from a mechanical, factor. It seems to me to be much more consonant with the purpose of regulations of this kind that the employer should not merely be under a duty to enter into a contract with a man to do the work, but that he should also be under a duty to keep the man there doing the work, and that the duty is not performed if the man is not there. It seems to me, therefore, that the words " shall be employed " in this regulation must not be regarded as being satisfied by the mere existence of a contract of employment, but that they are used rather in the sense of the man being actually engaged in the operation than being employed contractually to carry it out. We are not here concerned with the case of a man who was actually engaged in the work, but was doing it inefficiently, and such a case must remain to be dealt with when it arises. In my opinion the appeal ought to be allowed.

---

(1) By Docks Regulations, 1934, reg. 43: "When cargo is being "loaded or unloaded by a fall at a "*hatchway*, a signaller shall be "employed, and where more than "one fall is being worked at a "*hatchway*, a separate signaller "shall be employed to attend to "each fall."

GODDARD L.J. I agree. Regulation 43 must be construed as a protection for the plaintiff, but it would afford him no protection if we gave to it the construction which the judge gave. I agree that it is not necessary to decide what would be the position if a signaller had been present, but had negligently given a wrong signal or omitted to give a proper signal. That question does not arise. Giving to this regulation a reasonable construction which would afford a protection to the workman, we ought to hold that there was a breach of the regulation, for which the employers were responsible.

C. A.

1943

ASHWORTH
v.
J. McGUIRK
& Co. LD.

DU PARCQ L.J. I agree.

Appeal allowed.

Solicitors for plaintiffs: *J. H. Milner & Son*, for *Silverman and Livermore, Liverpool.*

Solicitors for defendants: *Smiles & Co., for H. G. C. Day & Co., Liverpool.*

J. W. H.

C. A.

1943
Oct. 1, 4, 18.

LOMAS *v.* M. JONES AND SON.

Negligence—Personal injury—Invitor—Unsolicited assistance to invitee —Negligence of invitee.

The defendants, by their servant G., delivered to the plaintiff, on his own premises, a heifer which was conveyed in a motor cattle lorry driven by G. The plaintiff, without any request from G., assisted in unloading the heifer. While the plaintiff was helping to shut the back of the lorry, one of the doors, which G. had negligently failed to secure properly, fell on the plaintiff and injured him. Stable J. held that in the circumstances G. had implied authority to accept the plaintiff's help, and that the defendants were liable:—

Held, by the Court of Appeal, that whether or no Stable J. was right (as du Parcq L.J. thought, the other members of the court expressing no opinion on this point) in holding that G. had implied authority to accept help, the defendants were liable on the ground that G., being an invitee on the plaintiff's premises, was under a duty to keep the lorry safe for the plaintiff whose presence was no more than a causa sine qua non of the accident, the effective cause of which was G.'s negligence, the fact that the plaintiff had himself taken part in closing the door being irrelevant.

APPEAL from Stable J.

The plaintiff, John Lomas, a farmer, contracted with the defendants, M. Jones & Son, for the conveyance of a heifer in their motor cattle lorry from Halton to the plaintiff's farm at Frodsham. On July 21, 1941, one Greenway, a servant of the defendants, took the heifer to the plaintiff's farm. The plaintiff gave Greenway some unsolicited assistance in unloading the heifer, and put it in the shippon. He then returned to assist Greenway in shutting up the lorry. The doors at the back of the lorry were hinged at the bottom, so that when let down they made a sloping platform for the cattle to walk down and when closed they were secured by bolts. The plaintiff, without any request from Greenway,

C. A.
1943
LOMAS
v.
M. JONES
AND SON.

helped to shut the first door. As the plaintiff was stooping to raise the second door, the first, which, through the negligence of Greenway, was insecurely bolted, fell on him causing injuries. In an action claiming damages for negligence the defendants contended that the plaintiff, being a mere volunteer in helping to shut the lorry, could not recover. For the plaintiff it was contended that that doctrine did not apply in the case of a man giving assistance on his own land in a matter in which he had an interest. Stable J. held that the circumstances were such that it must have been obvious to the defendants that help would be necessary and would probably be offered without invitation, and that Greenway had implied authority to accept it, and he gave judgment for the plaintiff for 1,200*l.* damages. The defendants appealed.

Laski K.C. and *H. I. Nelson* for the defendants. Though a master is in general vicariously liable for the acts of his servants there are certain well-recognized exceptions, e.g. the doctrine of common employment. So, a master is not liable to a person who, without his consent, express or implied, intermeddles with the duties of the servant. This used to be regarded as a branch of the doctrine of common employment, but that idea is no longer held. [They referred to *Degg* v. *Midland Railway Co.* (1); *Houghton* v. *Pilkington* (2); *Wright* v. *L. & N.W. Rly.* (3); *Hayward* v. *Drury Lane Theatre & Moss' Empires, Ld.* (4); *O'Sullivan* v. *O'Connor & Son* (5).]

Lynskey K.C. and *Rose Heilbron* for the plaintiff. There is no authority directly in point. The plaintiff needed no justification for being where he was, and Greenway owed to the plaintiff and to anyone lawfully on the plaintiff's premises the duty of an invitee to take care. To escape liability for his negligence the defendants must bring themselves within some exception to the general rule of vicarious responsibility. *Hayward* v. *Drury Lane Theatre & Moss' Empires, Ld.* (6) shows that the liability of a volunteer for his own hurt depends on trespass. Here the plaintiff was lawfully on his own premises. A duty to take care was vicariously owed to him by the defendants through Greenway, and unless he had done something unlawful the question of his being a volunteer does not arise. Here the duty to take care has arisen and has been broken, and the only possible defences would have been contributory negligence, which was not persisted in nor found, or volenti non fit injuria, but that cannot arise in the absence of scientia.

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(1) (1857) 1 H. & N. 773.
(2) [1912] 3 K. B. 308.
(3) (1875) L. R. 10 Q. B. 298; 1 Q. B. D. 252.
(4) [1917] 2 K. B. 899.
(5) (1887) 22 L. R. Ir. 467.
(6) [1917] 2 K. B. 899.

Laski K.C. in reply referred to *Potter* v. *Faulkner* (1).

Cur adv. vult.

Oct. 18. The following judgments were read:

LORD GREENE M.R. I have read the judgments which my brethren are about to deliver. I prefer to express no opinion as to the correctness of the ground on which Stable J. decided the case in favour of the plaintiff. While appreciating the force of what is said by du Parcq L.J., in his judgment, there is, I think, much to be said for the view that, whatever implied authority the defendants' driver may have had to ask for help in unloading the heifer, that operation had been completed, and there was no evidence that help in closing the doors of the van was necessary or would normally be invited by the driver. However this may be, and assuming that there was no implied authority to ask for help from the plaintiff, I agree with the reasons given by Goddard L.J., for dismissing the appeal.

This case is free from the complications which arise, or appear to arise, where the plaintiff is a trespasser or a bare licensee or a licensee with an interest or an invitee on the defendant's premises and is there injured by the negligence of the defendant's servant while taking part with that servant in some operation at the unauthorized or authorized request of that servant or without any request at all. Here the first question is as to the duty owed by the defendants to the plaintiff during such time as the defendants' van was present on the plaintiff's premises. This duty, in my opinion, clearly included the duty to see that the van was not put or left in such a condition as to be dangerous to the plaintiff lawfully present on his own premises. Prima facie this duty was broken when it is found that a door of the van fell on and injured the plaintiff owing to the negligence of the driver in failing to shoot the bolt. The fact that the plaintiff, with or without the implied authority of the defendants, had himself taken part in closing that particular door is quite irrelevant. It

(1) (1861) 1 B. & S. 800.

was not due to any negligence of his in so doing that the door fell upon him. It seems to me equally irrelevant to say that the plaintiff was helping the driver to close the second door when the first door fell on him. The fact that he was so helping no doubt explains how it came about that the plaintiff was in the position where he was when the accident happened, but this is quite different from saying that the accident was due to the fact that he was so helping. I can find nothing in the facts of this case to displace the prima facie liability of the defendants for the negligence of their servant. The appeal is dismissed with costs.

GODDARD L.J. The judge drew the inference in this case that the defendants' servant had implied or apparent authority to accept assistance in the unloading of the heifer, and, as I gather from his judgment, that assistance in unloading extended to help in closing the doors of the van. While I think there is a great deal to be said for this view I am assuming, without deciding, that the evidence did not justify such an inference. It follows, therefore, that the plaintiff had no right to assist the driver, and no excuse for so doing, and must be regarded as a trespasser so far as the van was concerned. I do not, however, propose examining the numerous authorities on the position of those who sustain injuries while rendering voluntary assistance in operations, because I do not think any are in point on the facts of this case. The accident happened in the plaintiff's farmyard. The defendants were invitees, and as such were bound to take reasonable care, both by themselves and their servants, that the van was not a source of danger to the invitor or other persons lawfully on the premises. Although the plaintiff had assisted in closing the door, which afterwards fell on him, he in no way contributed to that which caused it to fall. It fell solely because the defendants' servant failed to shoot the bolt securely. When it fell, the plaintiff was where he had a right to be. True, he was then engaged in doing something which he had not a legal right to be doing, but he was injured because he was where he was and not by reason of anything that he was doing. He was injured because a door, which ought to have been safe, fell on him, and the reason why it fell was a default of the defendants' servant in the course of his duty. If it is objected that the only reason why he was in the particular position was because he was assisting to close

C. A.

1943

Lomas
v.
M. Jones
and Son.

Goddard
L.J.

the door, the answer, I think, is that this was no more than a causa sine qua non. The effective cause of the accident was that the defendants' servant failed to shoot the bolt properly. Had the plaintiff been standing where he was, but merely looking on while the defendants' servant was raising the door, he would have none the less been injured. The accident happened, in my opinion, solely because the defendants' servant failed to exercise care in making the door safe, and, as there was a duty owed to the plaintiff to take care in that respect, the defendants are liable. Accordingly, it is unnecessary to decide whether the evidence justified the inference that the driver had implied or apparent authority either to seek assistance or to accept it if offered. In my opinion the appeal fails and should be dismissed.

du Parcq L.J. Stable J. has held that the facts of this case bring it within the principle affirmed by this court in *Wright* v. *London & North Western Rly. Co.* (1), on the authority of the decision of the Exchequer Chamber in *Holmes* v. *North Eastern Rly. Co.* (2). It was contended on behalf of the defendants that the judge erred in so holding in that there was no evidence that the assistance given to the defendants' servant by the plaintiff was given with the consent of the defendants, or that the defendants' servant acted within the scope of his employment in accepting that assistance. The quotation of a few lines from the judgment will show sufficiently clearly the view which the judge took of the facts. He said : " Here what was happening was this, that Greenway " was unloading a cow in the plaintiffs' own farm, an operation " with regard to which it must be obvious to anybody who " gives it a moment's thought, help would either be invited or " necessary, or, what is much more probable, offered without " invitation." If that view of the facts be right, it follows, in my opinion, that, in the absence of evidence that the defendants had forbidden the acceptance of the plaintiff's help, Stable J. was entitled to hold that the defendants' consent to its acceptance could be implied. The argument of counsel for the defendants has not satisfied me that the learned judge's view was wrong. The defendants' servant, Greenway, was delivering a heifer to the plaintiff who is a farmer. The construction of the wagon, photographs of

(1) (1875) L. R. 10 Q. B. 298.
(2) (1869) L. R. 4 Ex. 254 ; affd. (1871) L. R. 6 Ex. 123.

which were in evidence, is such as to indicate to my mind that Greenway's task would have been a difficult one if he had been compelled to perform unaided the whole operation of opening the wagon, letting down the doors and releasing and stabling the heifer. It is not in dispute that the assistance tendered and accepted was efficient. At the least it may be said, in my opinion, that in all the circumstances any reasonable employer in the defendants' position must have expected that the farmer or his servants, who would be fully competent to help, would, in fact, lend a helping hand to the man in charge of the wagon, and that such help, even if not essential, would certainly be desirable. This being so, it follows, in my judgment, that their consent to its acceptance by Greenway and their authority to him to accept it is to be implied. In my view, therefore, the judgment of Stable J. is right, for the reasons which he gave. It was suggested that it was incumbent on the plaintiff to prove an express consent by the defendants, or an express authority to their servant to give consent. I cannot accept this contention. In the ordinary affairs of life such consent and authority are frequently to be implied. If, for instance, a firm of carriers send only one of their servants to deliver to a warehouse a crate which is so heavy and cumbersome that it is physically impossible or difficult and dangerous for him to lift it unaided, that servant must be taken to have authority to obtain assistance, which is most likely to be forthcoming from the consignee or his servants. The facts here, though they may not be as strong as in that hypothetical case, do, in my opinion, justify the inference drawn by the learned judge. On this view of the case it is unnecessary to consider what the position would have been on the assumption that Greenway had no authority to accept the plaintiff's help. I will add, however, that on that assumption I am satisfied that the defendants could still rightly be held liable, for the reasons given by Goddard L.J., whose judgment I have had an opportuity of considering. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for defendants: *Theodore Goddard & Co., for Rutherfords, Liverpool.*

Solicitors for plaintiff: *Gregory, Rowcliffe & Co., for Linaker & Linaker, Runcorn.*

J. W. H.

1943
Oct. 27.

DICKINSON AND ANOTHER *v.* ST. AUBYN AND ANOTHER.

Landlord and tenant—Lease—Term of seven years—Option to tenant to terminate at end of five years—Covenant to paint " in the last quarter " of the said term "—Applicability of covenant to shortened term.

By a lease dated September 29, 1937, landlords demised to a tenant a flat for the term of seven years with a proviso that the tenant might terminate the tenancy after the expiration of five years. The tenant covenanted " to paint in the last quarter of the " said term . . . all the inside wood and iron-work of the demised " premises . . . ." The tenant gave notice to determine the tenancy in accordance with the option given by the lease. In an action by the landlords for damages for breach of the covenant to paint the premises :—

Held, that, although the term was stated to be one of seven years, it was subject to the proviso which reduced it to one of five years on the exercise of the option conferred on the tenant, with the result that " the last quarter of the said term " then became the last quarter of the fifth year, and the landlords were, therefore, entitled to damages for breach of the covenant.

ACTION tried by Hilbery J.

By a lease dated September 29, 1937, the plaintiffs, the landlords, demised to the first defendant a flat for the term of seven years from the date of the making of the lease with a proviso " that if the lessee shall desire to determine the term hereby " granted at the end of the fifth year thereof and shall give to " the lessors three months previous notice in writing of his " desire then immediately on the expiration of such fifth year " this present demise shall cease and be void but without " prejudice to the rights of either party in respect of any " antecedent breach of covenant." By cl. 4 of the lease the tenant covenanted " to paint in the last quarter of the said " term . . . . all the inside wood and ironwork of the demised " premises . . . ." The lease was assigned to the second defendant who attorned tenant to the landlords, and, pursuant to the provisions of the lease, gave notice to determine it at the expiration of the fifth year of the tenancy. In the present action the landlords claimed £77 from the tenant, the second defendant, for breach of the covenant to paint contained in cl. 4. By her defence the tenant pleaded that the covenant for decorations to be executed during the last quarter of the term granted by the lease did not apply to the last quarter of her tenancy since she had terminated the lease at the end of the fifth year, and that, therefore, there had been no breach by her of the covenant in the lease.

A. S. Diamond for the landlords.
Granville Sharp for the tenant.

HILBERY J. The short point for determination is whether, on the proper construction of a lease for a term of seven years with a proviso for its determination by the tenant at the end of five years, should he desire to do so, the landlords, on such notice being given, are entitled to the performance of a covenant to carry out decorative repairs which the lease provides are to be executed in the last quarter of the said "term." It is contended for the tenant that to see what term is created by the lease it is only the habendum which must be looked at, and that, as the habendum provides that the lease is to be for seven years, the tenants' liability does not arise unless the lease runs for that period. It is further said that the proviso to the lease is not to be construed in such a way as to enlarge the liability of the tenant, that liability having already been specifically defined and delimited, and that the form of the proviso, preserving, as it does, the rights of either party in respect of any antecedent breach of covenant, indicates that the alleged liability under cl. 4 cannot arise because it could not have been an antecedent breach at the time of the termination of the lease at the end of the fifth year. In my opinion, that argument is wrong, and Mr. Diamond is right in saying that, although the habendum of the lease must be looked at to see the term, the lease as a whole must be scrutinized since a proviso is one of the strongest ways in which an intention to create a condition can be expressed. He, accordingly, says that the right construction is, that, although the lease is stated to be one for seven years, it is subject to a proviso which makes the term one of five years if the lessee gives notice of his intention to exercise the option given to him by the proviso, and that in those circumstances the last quarter of the term becomes the last quarter of the fifth year. I think that that is the proper construction to be put on the lease, and, that being so, the landlords are entitled to judgment for £77.

Judgment for landlords.

Solicitors for landlords: *Barnes and Butler.*
Solicitors for tenant: *Markby, Stewart & Wadesons.*

P. B. D.

C. A.

1943

Oct. 13, 14, 25.

BISHOP & BAXTER, LD. *v.* ANGLO-EASTERN TRADING & INDUSTRIAL COMPANY, LD.

Contract—Consensus ad idem—Acceptance " subject to war clause."

Sellers of goods accepted an order from intending buyers " subject to war clause." In fact, war clauses took many forms:—

Held, that as there was no evidence that the parties had any particular form of clause in mind there was no consensus ad idem, and therefore no completed contract.

Love & Stewart, Ld. v. *S. Instone, Ld.* (1917) 33 T. L. R. 475, followed.

APPEAL from Atkinson J.

By letter, dated May 27, 1942, the defendants ordered from the plaintiffs 20,000 woollen cardigans at 61*s.* 6*d.* per dozen, minimum delivery at the rate of 2,500 per month, stating that the order had been accepted by the Board of Trade and that the defendants had applied for the free quota coupons and export licence which they hoped to receive within a fortnight. To this letter the plaintiffs replied by letter dated June 2, as follows: " We thank you for your order dated May 27 . . . . " which we are accepting subject to the necessary licences, etc., " being in order and subject to government restrictions as to " sales and war clause." The plaintiffs delivered 3,000 cardigans, for 1,872 of which the price was paid, but failed to deliver the remaining 17,000. In an action by the plaintiffs for the price of the remaining 1,128 cardigans delivered the defendants counterclaimed for damages for breach of contract, in answer to which the plaintiffs contended that the words " subject to war clause " did not refer to any specific war clause and the counter-offer made by them in their letter of June 2 was incapable of acceptance and consequently the two letters did not constitute a contract. Atkinson J. gave judgment for the plaintiffs on the claim and for the defendants on the counter-claim. The plaintiffs appealed.

Quass for the plaintiffs. The two letters of May 27 and June 2 did not constitute a contract because of the qualification contained in the words " subject to war clause." There was never a consensus ad idem in the minds of the parties. The evidence showed that there was no such thing as a recognized or standard war clause, that there were many kinds of war clause in use, and that no particular war clause was in the minds of the parties. The case is covered by *Love & Stewart, Ld.* v. *S. Instone & Co., Ld.* (1), the words in the alleged contract in that case being "subject to strike and lock-out clauses," and the House of Lords held that, there being a variety of strike clauses, the parties had not bound themselves to anything certain.

Devlin for the defendants. The court is considering a commercial contract under which deliveries were made. It is plain that both parties considered that they had made an enforceable contract, and the court will struggle to give a meaning to the contract ut magis valeat quam pereat. The words "subject to war clause" mean "subject to war," that is "subject to causes beyond our control in the way of war." They are analogous to "subject to the restraint of princes," or "subject to force majeure." If they are so vague as to be unintelligible, the words should be ignored.

Cur. adv. vult.

Oct. 25. The judgment of the court (Scott, MacKinnon and Goddard L.JJ.) was read by Scott L.J., who stated the facts and continued: Mr. Quass in a clear and concise argument submitted to us that the learned judge had misconstrued the counter-offer contained in the plaintiffs' letter of June 2. The error he complained of was that the learned judge had misconstrued the plaintiffs' stipulation that their acceptance of the defendants' order should be "subject," not only to "the necessary licences, etc., being in order and "subject to government restrictions as to sales," but also to "war clause." The two first stipulations might, he conceded, be sufficiently clear to be susceptible of tacit acceptance by conduct, but the added words "and war clause," he contended, made the plaintiffs' counter-offer incapable of acceptance and required an express consensus on the content of some specific war clause, since that was what the plaintiffs had asked for in their counter-offer. We agree with Mr. Quass's argument. Mr. Devlin was alive to its force and was driven into submitting that the word "clause" should be disregarded as mere surplusage and that the plaintiffs' third stipulation should be construed as if it had read "and war conditions" or "war "contingencies." We can see no justification for disregarding

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(1) (1917) 33 T. L. R. 475.

C. A.

1943

Bishop & Baxter, Ld. v. Anglo-Eastern Trading & Industrial Co., Ld.

so plain and definite a word whatever the circumstances at the time of negotiation might be, but in June, 1942, the internal disorganization of normal manufacturing and mercantile conditions in England as a result of the country's concentration on the war effort, made it most natural for a seller of woollen goods to seek the protection of a war clause in his contract. It may be that the manager of the plaintiff company had a mistaken notion that the two words he inserted were sufficient of themselves to give his company the protection against the interference of all war contingencies, direct or indirect, not covered by his first two stipulations, but what he thought is as irrelevant as what the would-be buyers might think. He asked for a war clause, and we have to construe his letter. War clauses take many forms, and the protection afforded to a seller by one may differ from that given by another. Until the parties had met and agreed on a particular form and content of a war clause, there was and could be no consensus ad idem.

It was urged by Mr. Devlin that both parties after June 2 thought a contract existed, and that that fact entitled the learned judge to hold that a contract did exist. The answer is obvious. The erroneous legal views of the parties did not alter the legal interpretation of the written words "and war clause" in the counter-offer, and until the parties had agreed on the particular clause to be incorporated in their agreement there could be no contract binding the parties to all the other terms of the two letters. After June 2 some other contract might, of course, come into existence as a result of either express oral agreement or to be inferred from the conduct of the parties, but that is not the contract sued on by counterclaim. The defendants were there relying expressly and solely on a written contract alleged to be contained in the two letters which I have read out. If those letters, properly construed, constituted no complete contract, the misapprehension of the defendants could not turn them into one.

That there were in June, 1942, many forms of war clause is notorious, and that fact was also admitted, and, indeed, proved, in evidence, and the joint selection of one form was, therefore, a necessary preliminary to the contract proposed in the counter-offer coming into existence. Since no such clause was agreed on, the contract on which the counterclaim rested and judgment was given never came into existence. The subsequent acceptance by the defendants of the plaintiffs' deliveries of 3,000 cardigans necessarily imported sales and every sale imports an agreement of sale either express or to be implied from conduct, but no agreement could be inferred in the terms of the plaintiffs' counter-offer to sell " subject to war clause," since ex hypothesi the very words precluded the possibility of consensus ad idem until the parties had discussed and agreed on some particular clause. The parties may, both of them, after June 2 have erroneously supposed that a contract in writing was already in existence, but if they did, it was because they did not realize that the plaintiffs' counter-offer required a further consensual step before the law could recognize the formation of a completed contract, and their bad law could not make a contract. Mr. Devlin was fully alive to this difficulty, and saw that there was no way out of it but to contend, first, that the words " and war clause " in the plaintiffs' letter of June 2 only had the effect of introducing an exception of war, and, secondly, that such a vague exception would not give the plaintiffs any exemption from liability on the facts of the case. This was, we think, the view taken by the learned judge, and it may well be that the conclusion would, if the word " clause " had been omitted from the letter, have been unassailable. The word, however, was there. It was quite unambiguous, and it introduced as unambiguous a condition as would have been introduced by the phrase " strike clause," but the condition was equally undefined and equally demanded consensual definition to make it an effective term of the agreement between the parties.

Viewed in this last aspect the question of interpretation on which the appeal turns, is, in our opinion, covered by the decision of the House of Lords in *Love & Stewart, Ld.* v. *S. Instone, Ld.* (1), where letters, otherwise constituting a complete and enforceable contract of sale of coal, bore a printed endorsement " subject to strike and lock-out clauses." The House of Lords there held that, as such clauses differed in their content, there could be no consensus ad idem, and, therefore, no completed contract resulting, until the parties had come to some further agreement on the content of some particular clause. It is not necessary to cite that case at length, but the reasoning of their Lordships is, in our opinion, directly apposite to the present case. The only other case to which it is necessary to refer is that of *Scammell* v. *Ouston* (2), and there the House of Lords held that the addition to a written contract,

(1) 33 T. L. R. 475.

(2) [1941) A. C. 251.

C. A.

1943

BISHOP & BAXTER, LD.
v.
ANGLO-EASTERN TRADING & INDUSTRIAL CO., LD.

which without the addition would have been a contract of sale of a motor-lorry, of a provision for finance by means of a hire-purchase agreement, was fatal to the existence of any enforceable contract at all. Their grounds were both that the condition was too vague to carry contractual force and that " the parties never in intention nor even in appearance reached " an agreement " on it ; per Lord Wright (1). Both decisions are relevant and both are binding on this court.

In deference to Mr. Devlin's argument we would add one further observation. Abbreviated references in a commercial instrument are, in spite of brevity, often self-explanatory or susceptible of definite application in the light of the circumstances, as, for instance, where the reference is to a term, clause, or document of a well-known import like c.i.f. or which prevails in common use in a particular place of performance as may be indicated by the addition of the epithet " usual " : see *Shamrock S.S. Co.* v. *Storey* (2), where " usual colliery " guarantee " was referred to in a charter-party in order to define loading obligations. But in the case before us the phrase in controversy gave no clue of any sort to indicate what particular war contingencies affecting performance were intended to apply. The stipulation necessarily remained wholly vague till the parties could agree on some particular war clause ; and no implication from the plaintiffs' deliveries or the defendants' payment can take the place of such a further agreement in fact.

The appeal must be allowed with costs here and below.

Solicitors for plaintiffs : *Dehn & Lauderdale.*

Solicitors for defendants : *Abbott, Anderson, Braithwaite & Whittaker.*

W. L. L. B.

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(1) [1941] A.C. 269.

(2) (1899) 5 Com. Cas. 21.

C. A.

WATKINSON *v.* HOLLINGTON.

1943
Oct. 20, 21.

Emergency legislation—Courts emergency powers—" Levying of distress " —Distraint on cattle damage feasant—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (i) (ii).

A distraint on cattle damage feasant is not a " levying of distress " within the meaning of the Courts (Emergency Powers) Act, 1939,

s. 1, sub-s. 2 (*a*) (i.), and, therefore, the leave of the court is not necessary before the remedy can be exercised.

Decision of Oliver J. reversed.

C. A.
1943
WATKINSON
v.
HOLLINGTON

APPEAL from Oliver J.

On July 31, 1941, cattle belonging to the plaintiff, R. A. Watkinson, strayed from his land on to land belonging to the defendant, R. Hollington, who, by his agent, seized and detained them. On December 24, 1941, the plaintiff without making any tender of amends wrote to the defendant requesting him to allow him to remove the cattle. On December 30 the defendant, by a letter of that date, refused to allow the cattle to be removed. The plaintiff thereupon brought an action against the defendant, alleging that the cattle were unlawfully detained by him in breach of s. 1, sub-s. 2 (*a*) (i,) and (ii.), of the Courts (Emergency Powers) Act, 1939 (1) since the defendant, in seizing and detaining them, was exercising a remedy which was available to him by way of " the levying " of distress " or " the taking of possession of . . . . property " without the leave of the court. By his defence the defendant pleaded that he was lawfully in possession of the cattle pursuant to his right at law to distrain on cattle damage feasant, and that the Courts (Emergency Powers) Act, 1939, had no application in the case of such a distress. Oliver J. held that a distress on cattle damage feasant was a " levying of distress " within the meaning of the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2 (*a*) (i.), and that, therefore, the leave of the court was necessary before the remedy could be exercised; that, consequently, the cattle were distrained without any legal right; and that, as a proper demand for their return had been made by the plaintiff and refused by the defendant, an action of detinue would lie. The defendant appealed.

Harold Brown for the defendant. It is not necessary to obtain the leave of the court before the right to seize cattle damage feasant can be exercised. If the decision of Oliver J. to the contrary is correct, this ancient right will have been abolished, at least for the duration of the war. The Courts

(1) Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2: " Subject " to the provisions of this section, " a person shall not be entitled, " except with the leave of the appropriate court,—(*a*) to proceed " to exercise any remedy which is " available to him by way of— " (i) the levying of distress; " (ii) the taking possession of any " property . . . . "

C. A.

1943

WATKINSON
v.
HOLLINGTON.

(Emergency Powers) Act, 1939, s. 1, sub-s. 2, applies only to remedies for debt or default: *Butcher* v. *Poole Corporation* (1), and the act of the defendant was neither. The whole basis on which the Act proceeds is that of contractual obligation, and as the defendant took possession of the cattle without reference to any contract he did not come within the terms of the Act. "Levying of distress" in s. 1, sub-s. 2, (*a*) (i.), means distress for non-payment of rent, based on a contractual obligation. The remedy of distress damage feasant cannot properly be described as a distress. The plaintiff at the time of the seizure was under no obligation to make amends, he was not in default. The liability was that of the trespassing animal rather than that of a human being: see Williams on Liability for Animals, p. 107. Further, the defendant never took possession of the cattle within s. 1, sub-s. 2 (*a*) (ii.) of the Act, when they came on his land by the plaintiff's default. All that the defendant did was in effect to make clear to the plaintiff that, as he had allowed the cattle to stray within his power, they must remain until the plaintiff had paid damages for the harm they had done. Read literally the section would forbid a man whose watch had been stolen to seize it from the thief without the leave of the court.

Herbert Malone for the plaintiff. The act of the defendant in seizing the cattle was unlawful, it having been done without the leave of the court, for what he did was the equivalent of levying a distress within the meaning of s. 1, sub-s. 2 (*a*) (i.), and it was also "the taking of possession of . . . . property" within sub-s. 2 (*a*) (ii.). Therefore, the plaintiff is entitled to maintain the action. The default on the part of the plaintiff in respect of which the defendant levied the distress consisted in his not tendering compensation for the damage done by the cattle. It is said that the legislature in enacting s. 1, sub-s. 2, which deals with extra judicial remedies: *S. & A. Services, Ld.* v. *Dickson* (2); did not contemplate its application to the old right of distress on cattle damage feasant, but the fact that the legislature has said something which goes beyond what one would suppose to have been its original intention does not justify the court in limiting the operation of the Act: per Clauson L.J. in *Smart Brothers, Ld.* v. *Ross* (3). It is stated in Wharton's Law Lexicon, 14th ed., p. 337, that distress is

(1) [1943] K. B. 48.

(2) [1940] 2 K. B. 219

(3) [1942] Ch. 158, 177.

" a taking without legal process, of a personal chattel from " the possession of a wrongdoer into the hands of a party " grieved, as a pledge for the redressing an injury, the " performance of a duty, or the satisfaction of a demand . . . . " This remedy may be resorted to by a landlord for recovery of " rent in arrear . . . . Distress may also be made at common " law on cattle damage feasant." Distress damage feasant is analogous to a distress for rent. The owner of land on which cattle have strayed must either drive the cattle off the land or bring an action to recover for the damage done. The leave of the court is a condition precedent to the exercise of the right of distress damage feasant, because the legislature, in passing the Act, has used words which include distress damage feasant. [Bullen & Leake's Precedents of Pleadings, 3rd ed., p. 731; Stroud's Judicial Dictionary, tit. Distress; New English Dictionary, Vol. iii, tit. Distrain (7); Mather's Law of Sheriff, 3rd ed., p. 609; *Hutchins* v. *Chambers* (1); were also referred to.]

SCOTT L.J. The argument for the plaintiff has throughout been based on the submission that the legislature, in s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1939, has used words which, whether advertently or inadvertently, cover the case of " distress damage feasant," and, therefore, require an application to the appropriate court for leave to exercise that right. The learned judge was impressed by the argument that the words of the Act, " the levying of distress," are wide enough to include this particular kind of distress. Accordingly, he gave judgment for the plaintiff with damages for the detention of the animals, estimating them at 16*l.* sterling altogether. Before us Mr. Brown has submitted that the legislature did not mean to include " distress damage feasant." Even if the statutory words are ambiguous so as to be capable of including that kind of distress, which I doubt, I agree with the argument for the defendant. It is necessary to consider the nature of the old common law remedy and also its incidents in law. Straying cattle may come from almost anywhere within a considerable distance. They do not carry their owners' names on their horns and the old law was that, if they are doing damage, they may be seized and, unless in the meantime their owner tendered sufficient amends for the damage, impounded, and detained indefinitely in custodia legis. It was realized that in practice the detention would be short, because it was practically certain that the owner would want his cattle. The distrainor was not required to do anything. The law left it to the owner of the cattle to take the necessary step, and that was, either to agree to pay the amount of the damage or to apply to the sheriff to "replevy" the cattle, that is, to take them back and deliver them into his (the owner's) possession. That, however, was not to be done by the sheriff unless the owner entered into a "replevin bond" to be answerable to the occupier of the land where damage had been done for the amount in money of that damage, which would be assessed by the jury in the replevin action. That was an effective procedure which worked very well. Subsequently, legislation was passed to allow the distrainor to sell the cattle if they were not reclaimed, so as to cover the cost of their keep. The gist of the procedure was the right of the occupier to seize the cattle at the very moment of the damage, while they were doing it—"damage feasant"—and to detain them. It was a remedy of distress which, differing from other forms of distress, could be exercised out of hand, at any time of the day or night.

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(1) (1758) 1 Burr. 579.

The remedies set out in the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2, which were subjected to the overriding condition of leave from the court have been styled remedies by way of self-help. With regard to remedies other than that of levying a distress "damage feasant," the provisions of the sub-section result in no interference with the existence of the right regarding which the conditions are imposed, but in the case of damage feasant, if the occupier of the land where the damage is being done is not allowed to take the cattle then and there, but is called on to apply to the court to get leave, the right is really destroyed, for it is a right which, if it is to be exercised at all, must be exercised on the spot and at the time of the trespass.

In my view, it could not have been the intention of the legislature that the words "the levying of distress" should be extended to so very peculiar a kind of distress as that called "distress damage feasant." I should have thought that the ambit of the sub-section was satisfied by applying it to ordinary forms of distress for rent, but there is an additional reason for so limiting the interpretation of its words. Where ambiguous language is used in an Act one is entitled to look at the long title. The long title of this Act is as follows: "An Act to "confer on courts certain powers in relation to remedies in "respect of the non-payment of money and the non-"performance of obligations (including powers in relation to "bankruptcy and winding-up proceedings), and to make "provision for purposes connected with the matters aforesaid." There are, therefore, two purposes expressly mentioned. To levy distress damage feasant is not to enforce the payment of money, because at the time of the distress no debt is due. In my view, it is not to enforce performance of obligations, nor is it in respect of non-performance of obligations. The words "obligation" primarily means a tie. Legally it was in origin the binding tie established by what is called a "bond" as between the obligor and the obligee, and I see no reason for disregarding that ordinary legal meaning of the word "obligation" in construing the long title of this Act. Sub-section 1 of s. 1 deals with the enforcement of rights through the court. such as execution to recover a sum of money, which falls directly under the first part of the long title, the non-payment of money. The language of the second part of the long title is, I think, satisfied by treating the word "obligation" as having been used in its primary meaning of a contractual or statutory obligation and not as including a mere liability in damages, and that interpretation is reinforced by observing that the proviso to sub-s. 1 expressly excludes from the scope of the sub-section a judgment for the recovery of damages for tort. Indeed, claims for damages for torts are wholly outside the Act, and, in so far as "distress damage feasant" can be regarded as a remedy in damages for damage done by the cattle, it is for a tort. The main object of the right, however, is to prevent further damage. For these reasons, it is, in my view, clear that the phrase "the levying of distress" in sub-s. (2) (*a*) (i.), does not include distress in respect of animals found by the occupier damage feasant. I do not think it is necessary to refer to any authorities because the interpretation of the Act which I have expressed seems to me to be self-evident. The appeal must be allowed with costs.

MACKINNON L.J. I agree. Distress is the substantive expressing the process indicated by the verb "distrain." "Distrain" meant originally "to constrain a person by the "seizure and detention of his property." That was all it meant as to any sort of distraining until 1689, in which year a landlord was given the right to sell the property of his tenant which he had seized in order thereby to exact the rent due from him. In that sort of distraining, therefore, the landlord, exercising the right, did more than seize and detain. He paid himself by selling the property seized. Hence came naturally the phrase, on such action by the landlord, " levy distress " and the word " levy," means " to raise a sum by legal execution or process." One who exercises the old common law right of distraining beasts damage feasant, does not " raise a sum by " legal execution or process." He does not " levy a distress." He merely exercises the ancient right of seizure and detention in order to constrain the owner of the beasts. I am quite clear that he who exercises this right is not " exercising a " remedy by way of the levying of a distress " within the meaning of s. 1, sub-s. 2, (*a*) (i.), of the Courts (Emergency Powers) Act, 1939.

GODDARD L.J. I agree. When one is construing the words of an Act of Parliament one must, to use the words of Lindley M.R. in *Thomson* v. *Lord Clanmorris* (1), have regard, not only to the words used, but also to the history of the Act, and the reasons which led to it being passed. Regard must be had to the mischief which had to be cured as well as the cure provided. du Parcq L.J. put the same consideration in *Butcher* v. *Poole Corporation* when he said (2) : " It is impossible " to construe words in an Act of Parliament without reference to " their context and the whole tenor of the Act." What is the whole tenor of the Courts (Emergency Powers) Act ; what were the reasons which led to it being passed ; and what was the mischief which had to be cured as well as the cure provided ? The original Act was passed, dealing only with matters which arose before the war, to suspend, not to destroy, rights which one person might have against another—rights which arose out of contract and only out of contract and had no relation to tort at all. You have to get leave of the court before you can exercise certain remedies, and then, when you apply for leave to exercise a remedy, the operation of the Act is that it is for the defendant to show that he is unable, in the words of the Act, " to pay the rent "—observe those words—" or other debt, or to perform the obligation in ques- " tion " immediately " by reason of circumstances directly or " indirectly attributable to " the present " war." The presence alone of those words in sub-s. 4 " to pay the rent " seems to me to show quite clearly what Parliament had in mind in

(1) [1900] 1 Ch. 718, 725.

(2) [1943] K. B. 58.

using the word "distress" in sub-s. 2. The absurdity of the position which would be reached in this case if we had to give effect to the argument of the plaintiff would be that if an occupier of land had to apply to the court for leave to distrain on animals then doing damage on his farm, no question could arise with regard to the defendant being able to show that he could not perform the obligation of paying damages by reason of matters directly or indirectly arising from the war, because the damages would be damages for tort which are expressly excluded from the Act. It is impossible to suppose for one moment that in using the words "levying of distress" Parliament was contemplating any sort of distress other than distress for rent. I think that is completely shown, not only by the long title of the Act, but by sub-s. 1, sub-s. 2 and sub-s. 4, to which I have referred.

The word "distress" is a word which has varying meanings in the law. Originally it was a seigniorial right by which a lord could enforce by attachment of chattels performance by a tenant of his obligation to pay rent or to perform services. As time went on, the word "distress" got an extended meaning. It was used to cover cases of the execution of process which issued out of the seigniorial court, the court-baron, or the court-leet. It was called "distress" because it was attached to the seigniorial right. It was the lord's court, and he had the right of issuing execution without going to the King's court, and, therefore, the same term was applied to that process as was applied to the right that he had of levying in respect of arrears of rent. To this day one uses the expression "distress" in respect of process which is levied by courts of summary jurisdiction, and in the statute of Elizabeth, which imposes the poor rate, one finds Parliament using the expression "distress." Distress for rates is an execution. That was quite clearly laid down in *Hutchins* v. *Chambers* (1), and was re-affirmed by this court and by the House of Lords in *Hickman* v. *Potts* (2). It was also applied to the right to seize animals which were doing damage on land, and that right was not attached to the ownership of land. The occupier of land could exercise that right and a commoner could exercise it if beasts were doing damage on a common over which he had rights. It is conceded in this case that, if the argument for the plaintiff is right and if the judgment of Oliver J. stands, that right is

(1) 1 Burr. 579.

(2) [1940] 1 K. B. 29; [1941] A. C. 212.

entirely gone and not suspended like all other rights are which are dealt with by the Courts (Emergency Powers) Act, for the only thing which the aggrieved occupier could do would be to drive the beasts off the premises and the right to distrain damage feasant would be gone. You cannot follow beasts which do damage, they must be distrained while still on the land. For rent you may follow goods which are removed to avoid distress. In my opinion it is abundantly clear that, in using the words "levying of distress," Parliament was considering the levying of distress for rent and for no other purpose. I agree that the judgment below should be reversed, and the appeal allowed.

Appeal allowed.

Solicitors for plaintiff: *Edward F. Iwi, for Vyvyan Wells & Sons, Finchley.*

Solicitors for defendant: *Pothecary & Barratt, for T. Anderson Davis, St. Albans.*

R. F. S.

C. A.
1943
Oct. 25, 26, 27.

J. LEAVEY & COMPANY LIMITED. *v.* GEORGE H. HIRST & COMPANY, LIMITED.

Practice—Pleading—Amendment—Departure from pleading at trial—Duty of judge and counsel.

Damages—Measure—Contract—Sale of goods—Breach—Goods not replaceable in market—Profit if contract had been carried out.

When it is desired to make a substantial departure from the pleadings at the trial of an action, it is the duty of both judge and counsel on both sides to see that the pleadings are amended so that counsel on the opposite side may have an opportunity to consider whether to ask for an adjournment.

When, on the breach of a contract for the sale of goods, the goods cannot be replaced in the market, the proper measure of damage is the profit which the purchaser would have made if the contract had been carried out.

APPEAL from Cassels J.

The plaintiffs carried on the business of clothing manufacturers and the defendants the business of woollen manufacturers for men's and women's wear. By an agreement in writing contained in three letters dated January 3, 7 and 9, 1941, the defendants agreed to sell to the plaintiffs 50 pieces of overcoating as described in the letters at 9*s.* 6*d.* a yard, delivery as ready after June, 1941. Each piece contained 75 to 80 yards and was known to be required for the purpose of manufacturing men's wearing apparel. A term of the contract was "strikes, breakdowns, or other unforeseen circumstances "excepted." On March 15, 1941, an Order was made called the Limitation of Supplies (Woven Textiles) (No. 7) Order, 1941, (St. R. & O., 1941, No. 323), which by para. 5 provided that between March 15 and September 30, 1941, the delivery of piece goods to unregistered customers was to be limited to 30 per cent. of the deliveries made to unregistered customers in the period April 1 to September 30, 1939. The plaintiffs were unregistered customers, and on June 16, 1941, the defendants wrote to them as follows: "Under the Limitation of Supplies "Order your quota with us for the period March 15 to "September 30, 1941, was 75 yards, and any balance of your "order was automatically cancelled as soon as the order came "into force. Against the above quota you have actually "had delivered to you since March 15 2,092 yards so that your "quota has been very greatly exceeded. In these circumstances, it is quite impossible to make any further deliveries "to you." Eight of the 50 pieces had then been delivered to the plaintiffs. The defendants persisted in this view in subsequent letters of June 19 and July 7, 1941. On July 10, 1941, the plaintiffs applied for a licence to replace woollen goods destroyed by enemy action in September, 1940, by goods ordered before June 15, 1941, from various manufacturers including 5,500 square yards from the defendants. On October 9, 1941, the Board of Trade issued a licence to the defendants to supply the plaintiffs with this amount of goods in excess of their quota, but the defendants intimated that they were not in a position to do so, and the licence was cancelled. Meanwhile, on October 1, 1941, the plaintiffs had begun proceedings for damages for breach of the contract, and, in the alternative, in respect of the defendants' repudiation of the contract by the letters of June 16 and 19 and July 7, 1941. Particulars of special damage were stated as follows:— "The plaintiffs would have been able to manufacture 1,050 "overcoats out of the said 42 pieces. The minimum profit "made by the plaintiffs on each overcoat is 18*s.*, their total "loss, therefore, is 945*l.*" The defendants set up the defence that they were prohibited from making any further delivery under the contract by reason of the Limitation of Supplies (Woven Textiles) Order. At the hearing before Cassels J. the defendants set up two other defences, (1.) that the exception in case of " unforeseen circumstances " in the contract applied to relieve them of liability, and (2.) that there was frustration of the contract. Although evidence was given in support of these defences, the pleadings were not amended. Cassels J. held (1.) that the contract was frustrated by the statutory prevention contained in the Limitation of Supplies (Woven Textiles) (No. 7) Order, 1941 ; (2.) that, if necessary, he would have held that this order came within the exception of " other " unforeseen circumstances " ; (3.) that, if he had had to consider the question of damages, he would not have accepted the plaintiffs' contention that the measure of damages was loss of profit, but that the real damages would be the difference between the contract price and the market price, and, as there was no market price, the damages were only nominal. If he had accepted the loss of profit as the measure of damages, he would have estimated them at 525*l*. The plaintiffs appealed. At the hearing in the Court of Appeal the defendants were required to amend their defence in writing so as to raise the two defences not originally pleaded. The case is only reported on the question of pleadings and on the measure of the damages.

Lynskey K.C. and Astell Burt for the plaintiffs.
Denning K.C. and Morle for the defendants.

LORD GREENE M.R. This case affords a very striking example of the confusion and possible injustice that may result when pleadings are treated at the trial in a very loose way.

The defendants, by their defence, set up one defence only. It was a defence in law and consisted of an allegation that the relevant statutory order had the effect of making it illegal, and, therefore, impossible, for the defendants to fulfil their contract with the plaintiffs. That defence was based on the theory that, when the statutory order prohibited the supply by a manufacturer of more than a certain proportion of his deliveries in the standard year, it operated to prohibit him from supplying to any individual customer more than a similar percentage of the goods supplied to that customer in the standard period. No attempt was made before the learned judge, or before us, to support that proposition, and it is, on the face of it, quite unsupportable, but at the trial the defendants were allowed to put up two quite new cases. One was based on a provision in one of the contractual letters: "Strikes, breakdowns, or other unforeseen circumstances "excepted," it being said that unforeseen circumstances had taken place excusing the defendants from performance of the contract. The original pleading was quite insufficient to support that case because it would have been necessary to allege that unforeseen circumstances had taken place and to particularise what those circumstances were, but the defendants in support of this new allegation, led evidence dealing with the facts alleged to form part of the unforeseen circumstances. The other new case which was raised at the trial was that of frustration. If that had been properly pleaded it would have been necessary to allege the facts which were relied on to bring into operation the doctrine of frustration. No such facts were alleged. Nevertheless, in spite of protests by counsel for the plaintiffs, the defendants were allowed to lead evidence in support of their case of frustration. The result was that the learned judge found in favour of the defendants on both those new issues. Obviously that might have resulted in a very serious injustice.

I have said more than once in this court that where it is desired to make a substantial departure from the pleadings it is the duty of the judge and counsel on both sides to see that a proper application is made for leave to amend the pleadings. The proposed amendment should be put in writing, so that counsel on the other side can consider it and apply for an adjournment if the nature of the amendment is one which involves his calling further evidence with which he was not prepared. I hope I shall not be thought pedantic on the matter of pleadings. It will be seen at once what grave possibilities of injustice there are if pleadings are brushed aside at the trial, new issues raised which have never been pleaded, and evidence called bearing on those issues with regard to which there has been no discovery and which the other side have no opportunity of meeting by other evidence.

In the present case we required the defendants to formulate the amendment which they desired and to ask for leave to amend before us, and, on the particular facts of the case and in view of what took place at the trial, we came to the conclusion that no real injustice would be done by allowing the amendment. I may say for myself that I did that with

C. A.

1943

J. LEAVEY & Co., LD. *v.* G. H. HIRST & Co., LD.

Lord Greene M.R.

some uneasiness because it may well be that further evidence would have been called by the plaintiffs, but, in view of the fact that no request was made for an adjournment, I did not feel that any injustice would be done by allowing the amendment. However, I think that it is important to make it quite clear that cases may very well occur in future where this loose way of dealing with pleadings and of allowing new issues to be introduced at the trial may lead to grave injustice to the other side, and that, where this court was satisfied that that had been the result, we should feel no difficulty in keeping the side which had introduced this new case strictly to its pleadings and allowing it to argue the appeal only on the basis of those pleadings. This court is continually being put in a difficult position. Discussions arise between counsel whose recollections differ as to what was said at the trial, and we then have to decide on the proper method of doing justice without the full facts being before us.

[His lordship then dealt with the substance of the case and held (1.) that on the true construction of the contract "unforeseen circumstances" referred to circumstances making the performance of the contract impossible and that no fact was proved at the trial to cause these words of the exception to apply; and (2.) that frustration of the contract had not been caused by the Limitation of Supplies (Woven Textiles) (No. 7) Order, 1941, seeing that (*a*) it only applied until September 30, 1941, and that delivery under the contract need not take place until after that date; (*b*) the quota fixed for the manufacturer might under the order be departed from by licence granted by the Board of Trade, so that, on any view, it could not be said that the contract was at an end until a reasonable time had been allowed for trying to obtain a licence which the plaintiffs were in a good position for obtaining and, in fact, obtained early in October, 1941, following their application on July 10, 1941. His lordship then continued :] The only other question relates to damages. The effect of the Limitation of Supplies Order was that the plaintiffs were unable to obtain substituted goods from some other source. There was no available market into which they could go and limit their damages by purchasing goods of the same character. The learned judge held that that circumstance was sufficient to justify him in saying that the damages could only be nominal. With great respect to him, I cannot help thinking that the conciseness of his language possibly did not reflect his thought, because such a proposition will not bear examination. Mr. Denning put it in what may very well be the way it struck the mind of the learned judge, although he has not so expressed himself. He contended that as prima facie the market price is the basis of the calculation of damages and no other admissible principle of assessing damages had been shown to be applicable, the result must necessarily be that the plaintiffs had not established any damage other than the nominal damage which the law assumes on a breach of contract. In my opinion, that proposition, on the facts of this case, is not correct. The evidence led at the trial on both sides went to the question of the profits which the plaintiffs would have acquired by making the goods up into overcoats and selling them if the contract had been carried out. There was a conflict of evidence. The plaintiffs' evidence fixed the profit at 18*s*. an overcoat and the defendants' evidence fixed the profit at 10*s*. an overcoat. The learned judge took the view that, if he had had to fix the damages on the basis contended for by the plaintiffs, he would have fixed them at the lower figure. Before us, it was not contended that that view was wrong, and the figure so arrived at is 525*l*. In my opinion, in the circumstances of this case, this method of reaching the figure of damages was the only available method. The result is that the appeal should be allowed with costs here and below and that judgment should be entered for the plaintiffs for the sum of damages which I have mentioned.

MACKINNON L.J. I agree. As regards damages I do not think I can add anything to what my lord has said.

DU PARCQ L.J. I agree. I do not know any way in which the value of the goods to the plaintiffs could have been arrived at except that which the Master of the Rolls and MacKinnon L.J. have already said should be adopted. It is very difficult to lay down general rules and to argue from one case to another, but in this particular case I believe that to be the only rule that could be adopted. It is, of course, quite impossible to say that, where there is no market price, the plaintiff is to get no damages at all. That most unjust result obviously must be avoided.

Appeal allowed.

Solicitors for plaintiffs: *H. B. Wedlake, Saint & Co.*

Solicitors for defendants: *Jaques & Co., for Scholefield, Taylor & Maggs, Batley.*

H. C. G.

C. A.

1943
Oct. 13.

WARE *v.* GARSTON HAULAGE COMPANY, LIMITED.

Nuisance—Highway—Obstruction—Stationary vehicle—Unattended and with no rear light at night.

A motor cyclist at night ran into the back of a trailer which was attached to a stationary lorry standing on its near side of a highway. The lorry and trailer were unattended and no rear light showed from the trailer :—

Held, that the lorry and trailer were an obstruction on the highway, and as such, constituted an actionable nuisance.

APPEAL from Lewis J., at Derby Assizes.

The defendants' lorry with a trailer, while on a journey from Derby to Nottingham, broke down at Borrowmarsh, on the Nottingham Road, at about 10 a.m. on November 18, 1941, and the driver brought the lorry and trailer to the near side of the highway. In response to a telephone message, a mechanic arrived from Nottingham, removed the back axle of the lorry and took it to Nottingham for repair. At lighting-up time, which was about 5.35 p.m., the driver and his mate switched on the lights of the vehicles, namely, two side lights showing to the front and a rear red light on the lorry and similar lights on the trailer, the same switch on the cab of the lorry controlling lights on both vehicles. At 7.20 p.m., when it was dark, the driver and his mate left the lorry unattended and walked to the police station, a distance of three-quarters of a mile, to obtain four hurricane lamps with which to define the position of the lorry and trailer on the highway. Both the lorry driver and his mate said in their evidence that all the lights of both vehicles were alight when they left them. At 7.30 p.m. the mechanic returned from Nottingham with the axle and found James Ware and his motor cycle lying partly underneath the trailer. The red glass of the rear lamp of the trailer lay broken on the ground and the bulb was smashed. James Ware was suffering from personal injuries from which, two days later, he died. The plaintiff, the mother of James Ware, brought an action against the defendants claiming damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provision) Act, 1934. The statement of claim was based on negligence, and, by her particulars, the plaintiff said that the servant or agent of the defendants : (*a*) left the lorry and trailer stationary in darkness without any rear light ; (*b*) left the lorry and trailer without a rear light, unattended; (*c*) failed to take any steps to warn other users of the road of the presence of the lorry in a dark place on the road; and (*d*) failed to prevent the lorry and trailer from being run into from the rear. At the trial several witnesses gave evidence for the plaintiff that at 7.20 p.m., or shortly afterwards, the rear-lamp of the trailer was unlit. Lewis J. found that there was no rear-light showing from the trailer when James Ware collided with it, and that the driver and his mate knew that they had a faulty rear lamp on the trailer and with that knowledge left the lorry and trailer unattended. On the ground of this negligence he gave judgment for the plaintiff for 400*l.* under the Fatal Accidents Acts and for 339*l.* 8*s.* 9*d.* under the Law Reform (Miscellaneous Provisions) Act, 1934. The defendants appealed.

Cartwright Sharp K.C. (*A. D. Karmel* with him) for the defendants. There was no evidence of negligence. The defendants, however, admit that at the time of the collision, there was no rear-lamp alight on the trailer. [Goddard L.J. If a vehicle is left stationary on the highway at night, unlit and unguarded, surely it is an obstruction on the highway and an actionable nuisance.] I do not see the answer to that proposition put to me.

Eddy K.C. and *Lloyd-Jones* for the plaintiff were not called on.

SCOTT L.J. In the course of the argument counsel for the defendants was asked by Goddard L.J. whether, if the lorry and trailer were on the highway at the time of the accident, unattended and with the trailer unlighted so that it could not be seen, it was not a dangerous obstruction in the highway and so a nuisance. In my view, it was. If anything is placed on the highway which is likely to cause an accident through being an obstruction to those who are using the highway on their lawful occasions (such as a vehicle unlighted and unguarded standing there at night) and an accident results, there is an actionable nuisance. Even if the judge were wrong, as counsel suggests, in thinking that he was entitled to decide this case on the ground of his finding of negligence by the driver and his mate (and on that I make no comment, for we could not differ from his finding without going very carefully into the evidence), the plaintiff is entitled to hold his judgment on the ground that the facts, as proved,

C. A.
1943

WARE
v.
GARSTON
HAULAGE
CO., LD.

Scott L.J

show that there was a nuisance. There was a dangerous obstruction in the highway and consequently an absolute duty on the defendants to light it or otherwise efficiently guard it to prevent accidents. It is no answer for the defendants to say that the light on the trailer had gone out after they had left the vehicles to go to the police station to procure hurricane lamps. The appeal must be dismissed.

MACKINNON L.J. I agree.

GODDARD, L.J. I agree.

Appeal dismissed.

Solicitors for defendants: *Vizard, Oldham, Crowder and Cash.*

Solicitors for plaintiff: *Boxall and Boxall.*

C. G. M.

C. A.
1943
Nov. 8, 10.

BRYANSTON PROPERTY COMPANY, LIMITED v. EDWARDS.

Landlord and tenant—Rent restriction—Standard rent—Tenancy agreement—Proviso permitting deduction from rent during war and three months afterwards—Progressive rent—Proviso a "term or condition" of which statutory tenant entitled to benefit—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, c. 17), *s.* 12, *sub-s.* 1 (*a*) (*as amended by s.* 3, *sub-s.* 1, *and sch. I to the Rent and Mortgage Interest Restrictions Act,* 1939), *s.* 15, *sub-s.* 1.

By a tenancy agreement dated March 6, 1943, a flat was let from February 8 to March 25, 1941, and afterwards from quarter to quarter, until determined by a quarter's notice in writing, at a yearly rent of 275*l.* payable quarterly in advance. Cl. 4 (1.) of the agreement provided that so long as the war with Germany continued and for three months after an armistice, the landlord would allow the tenant to deduct 85*l.* a year from the rent made payable. The landlord having determined the tenancy by notice to quit, the tenant held over under the Rent Restriction Acts:—

Held, that the standard rent was 275*l.* a year, but that the statutory tenant was entitled, under s. 15, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to the benefit of cl. 4 (1) of the tenancy agreement.

Phillips v. *Copping* [1935] 1 K. B. 15 explained.

Per Lord Greene M.R. (with whom MacKinnon L.J. agreed).

The flat was let at a progressive rent within s. 12, sub-s. 1 (*a*), of the Act of 1920, and the higher rent was, therefore, the standard rent. Per du Parcq L.J.: The flat was let at a rent of 275*l.* a year subject to a temporary deduction, and on this ground the standard rent was 275*l.*

Appeal from Marylebone county court.

By a tenancy agreement, dated March 6, 1941, the plaintiffs, Bryanston Property Co., Ld., let to the defendant, W. A. M. Edwards, the flat 46 Stourcliffe Close, Bryanston Square, London, from February 8, 1941, until March 25, 1941, and thereafter from quarter to quarter until either party should determine the tenancy by one quarter's notice in writing at the yearly rent of 275*l.*, payable quarterly in advance. Clause 4 (1.) of the tenancy agreement provided: " So long as the present " state of war shall exist between Great Britain and Germany " and for three months after the quarterday next following an " armistice the landlord will allow the tenant to deduct from " the rent hereby made payable the sum of 85*l.* per annum by " equal quarterly payments . . . ." The premises had never been let before the making of this tenancy agreement. By notice in writing, dated June 23, 1942, the plaintiffs determined the tenancy on September 29, 1942, and after that date the defendant continued in possession of the premises as a statutory tenant under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. On November 24, 1942, the plaintiffs gave notice to the defendant that the rent of the premises would be 275*l.* per annum as from December 25, 1942, but the defendant refused to pay a larger yearly rent than 190*l.*, being 275*l.* less the permitted deduction of 85*l.*, and in January, 1943, the plaintiffs began proceedings for 21*l.* 5*s.*, the difference between the two rates for the quarter's rent due December 25, 1942. The defendant, by his defence, contended that 190*l.* was the standard rent under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and, in the alternative, that, if 275*l.* was the standard rent, he was entitled to the benefit of the provision in cl. 4 (1.) of the tenancy agreement. The county court judge dismissed the action, holding that if the standard rent was 275*l.* the defendant was entitled, as statutory tenant, to the benefit of the provision in cl. 4 (1.) of the agreement, and, therefore, need only pay a rent of 190*l.* while that provision remained in force. The plaintiffs appealed.

Beney K.C. and *Squibb* for the plaintiffs. The standard rent under s. 12, sub-s. 1 (*a*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent and Mortgage Interest Restrictions Act, 1939 (1) is 275*l*. and not 190*l*. The yearly rent reserved is 275*l*., and the proviso in cl. 4 (I.) of the tenancy agreement merely gives the tenant the right to satisfy the full rent by a lower payment by way of deduction. If, however, that view is not accepted, this is a case where there is a progressive rent—190*l*. until three months after the armistice and thereafter 275*l*.—and on that view the maximum rent is the standard rent : see proviso to s. 12, sub-s. 1 (*a*) of the Act of 1920. *Wheeler* v. *Wirral Estates, Ld.* (2) turned on a different state of facts, but Lord Wright's dictum (2) assists here. In *Goldsmith* v. *Orr* (3) Bailhache J., sitting in the Divisional Court, took the view that, for a rent to be a progressive rent, there must be more than one increase of rent, but that was not dealt with in the Court of Appeal (4). [LORD GREENE M.R. It might be said here that the increased rent never became payable before the tenancy was determined by notice.] The rent was not the less a progressive rent. Again, the county court judge was wrong in holding that the defendant was entitled, under s. 15, sub-s. 1, of the Act of 1920, to the benefit of cl. 4 (I.) of the tenancy agreement. The present case is directly covered by *Phillips* v. *Copping* (5) which decided that when premises are let at less than the standard rent the rent can be increased to the standard rent on a holding-over under the Act. Here, the reduced rent ceased to be the rent payable on the holding-over by the defendant. In *Phillips* v. *Copping* (1), Maugham L.J. expressed the view (2) that s. 15, sub-s. 1, had nothing to do with the payment of rent.

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(1) By Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (as amended by the Act of 1939, s. 3, sub-s. 1, and sch. I) : "For "the purposes of this Act, except "where the contract otherwise "requires :—(*a*) The expression "'standard rent' means the rent "at which the dwelling-house was "let on September 1, 1939, or "when the dwelling-house was not "let on that date, the rent at "which it was last let before that "date, or, in the case of a dwelling-"house which was first let after the "said September 1, the rent at "which it was first let. Provided "that, in the case of any dwelling-"house let at a progressive rent "payable under a tenancy agree-"ment or lease, the maximum rent "payable under such tenancy "agreement or lease shall be the "standard rent."

By s. 15, sub-s. 1, of the Act of 1920 : "A tenant who by virtue "of the provisions of this Act "retains possession of any "dwelling-house to which this "Act applies, shall, so long as he "retains possession, observe and "be entitled to the benefit of all "the terms and conditions of the "original contract of tenancy, so "far as the same is consistent with "the provisions of this Act . . ."

(2) [1935] 1 K. B. 294, 300.

(3) (1920) 122 L. T. 656.

(4) [1920] W. N. 250 ; 123 L.T. 614.

(5) [1935] 1 K. B. 15.

Denning K.C. and *Stranders* for the defendant. The standard rent is only 190*l.* On the construction of the tenancy agreement the covenant is to pay the rent of 275*l.*, subject to the deduction permitted by cl. 4 (I.). It follows that 190*l.* was the real, effective rent, and it continued to be so until the tenancy was determined by the notice to quit. The proviso to s. 12, subs. 1 (*a*), as to progressive rent does not apply to a letting after the Act of 1939 has come into force. If it did, it would afford landlords an easy way of making the standard rent too high. A tenant who agreed to pay a lower rent would not mind agreeing to pay a higher rent at a date after that on which he intended to determine the tenancy. [They referred to *Goldsmith* v. *Orr* (3)]. Again, there must be more than one increase in the rent to make it a progressive rent, and the increase must be certain. Here the tenancy was determinable before the rise in rent was to take effect, and it was in fact so determined. If, however, the standard rent is 275*l.* the defendant, as statutory tenant, is still entitled, by virtue of s. 15, sub-s. 1, to the benefit of cl. 4 (I.), for cl. 4 (I.) is a " term " of the tenancy and one in no way inconsistent with the Act. The Act prevents increases over the standard rent except as provided, but there is nothing to prevent less than the standard rent being payable, *Phillips* v. *Copping* (1) is an entirely different case, and there is nothing in it inconsistent with this contention. [They also referred to *Baylye* v. *Hughes* (4) and *White* v. *Southend Hotel, Co.* (5)].

Beney K.C. replied.

LORD GREENE M.R. Two questions arise. The first is: What is the standard rent within the meaning of the Rent Restriction Acts ? The flat was first let after September, 1939, and, accordingly, under the Act of that year the standard rent is the rent at which it was first let. The question then falls under two heads. First, it is said that on the true construction

(1) [1935] 1 K. B. 15.
(2) Ibid. 24.
(3) [1920] W. N. 250.
(4) (1629) Cro. Car. 137.
(5) [1897] 1 Ch. 767.

of this agreement the rent payable during the war is 190*l.*, and that that is the standard rent. The plaintiffs on the other hand, say that the rent is 275*l.* and that the provision for deduction during the war does not affect that fact. If the language of the lease is examined in a rather technical manner, it is true to say that all that cl. 4 (1.) provides is a liberty to the tenant, by the process of deduction, but not otherwise, to satisfy by the payment of a smaller sum the obligation to pay a larger one. On that basis it is argued that the larger sum of 275*l.* is the rent. Not without hesitation, I have come to the conclusion that that argument ought not to prevail. The actual amount of cash which the tenant is bound to pay under this agreement is 190*l.* and no more. No distinction is drawn between the 190*l.* and the 275*l.* in the other clauses of the agreement which relate to rent. The proviso for re-entry, for instance, refers to " the said yearly or other rents hereby " reserved " being in arrear and unpaid. Moreover, in applying an Act like the Rent Restriction Act to a document of this kind, I do not think that too much attention should be paid to technical argument. The Act contemplates the substance of the obligations of the tenant, and here the tenant is to pay 190*l.* and no more.

The next branch of the case in relation to standard rent arises under the proviso to s. 12, sub-s. 1 (*a*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Act of 1939, it being said on behalf of the plaintiffs that this is a case of a progressive rent so that the maximum rent of 275*l.* payable under the agreement is the standard rent. Various arguments are put forward on behalf of the defendant against that view. Before dealing with the principal argument, I should say that the phrase " progressive " rent " is not a term of art. It suggests to my mind a rent which varies by way of increase either by reference to fixed and ascertained periods or by reference to the happening of contingencies. I can see no reason for cutting down the scope of the phrase " progressive rent " in the way in which the defendant would. It is said, for instance, on broad grounds that, if the phrase covers such a case as this, the object of the Act will be defeated because it would enable a landlord letting his premises for the first time after September 1, 1939, to fix a small rent for part of the term, for example, by reference to the continuation of hostilities, and then provide that, when hostilities were over, the rent payable should be increased to a very high figure. That, it is said, would enable a landlord to exploit the post-war tenant by requiring payment, when he comes to let the premises after the war, of a very high rent on the ground that the maximum rent was the standard rent. I can well see that such a manœuvre would be available to a landlord, but it is to be observed that ever since 1919 a similar manœuvre has been possible. Whether or not it has occurred in practice I do not know, but it is for the legislature to take steps to prevent it if it is so desired. As the Act stands I do not see how that result can be avoided. It would not be right to cut down so comprehensive a phrase as " progressive rent," merely because in certain circumstances it might lead to a result which would appear to be contrary to the policy of the legislature.

So much for that general argument. Particular arguments were also adduced. The first was that a progressive rent is not a rent which progresses by one step only, but that there must be at least two steps of progression. I see no justification for introducing that limitation. Then it is said that, in the proviso to s. 12, sub-s. 1 (*a*), the phrase used is " the " maximum rent payable " which must mean " payable in " any event," so that the tenant must be bound by his contract to pay it as and when the increase in the rent becomes effective. Here there is no such fixed obligation on the tenant, because it is always possible for him by giving notice to quit to avoid payment of the higher rent. I do not think that that argument ought to prevail. If the tenancy agreement provides that the rent is to be raised in certain circumstances, the fact that the tenant, by giving notice, can avoid coming under that liability does not prevent the rent from being a progressive rent. If he does not give notice the rent will be payable, and I think that " payable " means payable in accordance with and subject to the provisions of the tenancy agreement. Again, it was said that there could not be a progressive rent when the time at which it was to come into force was uncertain, as in the present case. There, again, there seems to me to be no justification for writing any such qualification into the language of the section.

Progressive rent under tenancy agreements and leases may take a variety of forms according to circumstances. For instance, a landlord may agree that a tenant shall pay a lower rent while the landlord is doing certain repairs or alterations, and that, as soon as those repairs or alterations are finished, the rent shall be at a higher rate. The date when that higher rate is to come into force may be made to depend on the time when the work is completed. That, of course, will be quite uncertain, but it seems to me that such a case would be a true case of a progressive rent within the section. In my opinion, therefore, the standard rent under this agreement is 275*l*., that being the maximum rent payable under the agreement.

The second part of the case depends on the application of s. 15, sub-s. 1, of the Act of 1920. Starting on the basis that 275*l*. was the standard rent, the county court judge held that the provisions of cl. 4 (1.) enabling the tenant to deduct 85*l*. a year during the war, was a term or condition of the original contract of tenancy which was imported by virtue of the section into the statutory tenancy, and he decided, accordingly, that the defendant was entitled, so long as the war continued, to remain in as statutory tenant at the lower rent. In my opinion, the learned judge came to the right conclusion. Apart from authority, it seems to me to be reasonably clear that the provision with regard to deduction from rent during the war is a term or condition of the original contract. The phrase " terms and conditions " is, again, not very technical. The sub-section does not use the word " covenant," but, subject to what I have to say about the authorities, the word " terms " must, I think, include covenants. For instance, if the original contract of tenancy contained repairing covenants by the tenant, those covenants would, I think, be imported into the statutory tenancy when the contractual tenancy came to an end. In the present case, what we have is not a covenant, but what is quite aptly described as a term of the agreement, namely, a provision inserted in favour of the tenant enabling him in certain circumstances to satisfy the obligation to pay the rent of 275*l*. by the payment of a lower sum. That, I should have thought, was beyond question a term of the tenancy agreement.

Is there anything in decided authority to compel us to take a different view? It is said that the matter was decided in this court in *Phillips* v. *Copping* (1). The learned county court judge, however, was of opinion that there was nothing in that case which constrained him to decide in favour of the plaintiffs, and, in my opinion, he was right. That case raised the question whether, when a house had been let at a rent lower than the standard rent, the landlord was entitled,

(1) [1935] 1 K. B. 15.

when the tenancy came to an end, to increase the rent payable by the tenant who had held over as a statutory tenant, up to an amount not exceeding the standard rent. It was held that he was entitled to do so. Sect. 15 came into the argument in this way. It was argued on behalf of the tenant that the covenant in the lease with regard to rent was a covenant for a specific sum which was lower than the standard rent of the house, that that was a term of the original contract of tenancy in no way inconsistent with the provisions of the Act, and, therefore, that a covenant for the payment of that lower rent was, by virtue of the sub-section, imported into the statutory tenancy. That argument was rejected, all the members of the court taking the view that there was nothing in the Act, apart from this sub-section, which deprived the landlord of his common law right to fix the rent, provided that in doing so he did not exceed the limit laid down by the Act, namely, the standard rent. Scrutton L.J. did not refer to s. 15, but it was referred to by Greer L.J., and Maugham L.J., and as Maugham L.J. dealt more fully with it I will consider his language first. He said (1): "Then comes s. 15 as to the "effect of which different opinions have been expressed. The "section created a statutory tenancy and defends the possession "of the statutory tenant, saying that he shall 'so long as he "'retains possession, observe and be entitled to the benefit of "'all the terms and conditions of the original contract of "'tenancy, so far as the same are consistent with the "'provisions of this Act.' What does that mean? To my "mind the phrase is not so framed as to extend to the case of "the payment of rent. It is not dealing with rent. The "tenant is to observe and be entitled to the benefit of certain "terms and conditions. It does not say that he will observe "the covenant to pay rent, and the words are not apt to "describe the events which have happened since the Act "came into force, for example, an increase of rent permitted "by s. 2, nor does it say anything about the landlord's right to "recover rent. However that may be, and whatever may be "the solution of the doubtful questions as to the original "tenancy which are to apply by virtue of that section to the "statutory tenancy, the argument based upon the first three "sections of the Act is unaffected by it. They cannot mean "that a tenant is entitled to hold the premises at a rent lower "than the standard rent. If that had been intended it would

(1) [1935] 1 K.B. 24.

C. A.

1943

BRYANSTON PROPERTY CO., LD. v. EDWARDS.

Lord Greene M.R.

" have been easy to express it in clear terms, and I think " ss. 1, 2 and 3 indicate the contrary. In my opinion this right " of a landlord on the expiration of a legal tenancy to raise the " rent to the standard rate was his right at common law and " it has not been interfered with by the Act." As I read his judgment, however, Maugham L.J., did not find it necessary to express a concluded opinion as to the limitation on s. 15 because he says: " However that may be and whatever may " be the solution of the doubtful questions as to the original " tenancy which are to apply by virtue of that section to the " statutory tenancy." He bases his conclusion really on the construction of ss. 1, 2 and 3, which he says do not take away the common law right to put up the rent to the standard rent. He is really regarding those sections as saying by implication that nothing in the Act is to deprive the landlord of the right to raise the contractual rent up to the level of the standard rent. His view, which, in my opinion, is truly a dictum, that s. 15 " is " not dealing with rent " is, I think, clearly expressed with regard only to what was relevant in that case, namely, the covenant to pay the rent. All he is saying is that the effect of the section is not to import into the statutory tenancy the covenant to pay rent which was to be found in the contractual tenancy. Greer L.J. dealt with the matter quite shortly. He said (1): " An argument was based on s. 15 of the Act of " 1920 suggesting that the tenant was entitled to retain " possession of the house at the rent which she had been paying. " The section has not that effect. I think it was meant to " preserve the terms of the existing lease subject to the " provisions of the Act as to the rent, and restricting eject- " ment." There, again, those observations must, I think, be limited to the particular matter then in hand, namely, whether the section had the effect of carrying the contractual obligation to pay rent over into the statutory tenancy.

The present case is very different from that. This is not a case of carrying the covenant to pay rent into the statutory tenancy. The landlord increases the rent to 275*l*. That rent, as I have said, is the standard rent. The question then arises whether the right which the tenant had possessed with regard to precisely the same rent under the tenancy agreement is imported into the statutory tenancy by virtue of the section. It seems to me that a provision whereby the defendant can satisfy his obligation to pay the higher rent by paying a lower rent, is truly a term of his tenancy, and, accordingly, that his right to make that deduction as against what has now become the standard rent under the statutory tenancy is maintained and preserved. That conclusion is not merely in accordance with the language of the section, but is also an eminently just result. In my opinion, the decision appealed against was right on that ground, and the appeal should be dismissed with costs.

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(1) [1935] 1 K. B. 22.

MACKINNON L.J. I agree. I think there can be no doubt that cl. 4 (I.) is a term or condition of the original contract of tenancy of which the statutory tenant is entitled to the benefit, unless it is inconsistent with the provisions of the Act. I cannot find that it is in any way so inconsistent, and, therefore, I think that the judge was right in deciding this case in favour of the tenant by reason of the provisions of s. 15, sub-s. 1, of the Act of 1920.

DU PARCQ L.J. I agree that this appeal should be dismissed. I must add a few words because, so far as the first point is concerned, I have arrived at my conclusion for a reason different from that of the Master of the Rolls. I agree that one ought not to be too technical in construing this Act. Lord Halsbury once said of the Workman's Compensation Act that the draftsman had deliberately avoided technology, and that is probably true also of the Increase of Rent Acts.

If a tenancy agreement merely said that the rent (to take the figure from the present case) was 275*l.*, but that the tenant was to be entitled to deduct 85*l.* from that sum, I should have no doubt that the rent under that agreement was 190*l.* If the agreement went on to say that after the expiration, let me say of one year, the deduction which the tenant was entitled to make should be only 50*l.* and not 85*l.*, then I should have no doubt that after the expiration of one year the rent was being increased, and I should say that that was an instance of a progressive rent. Here there is something more. It is agreed that during the existence of a certain state of affairs, which is temporary, the tenant shall be permitted to make a deduction of 85*l.* from the rent of 275*l.* which has been fixed in the first clause of the tenancy agreement. The position is the same as if, for instance, a deduction from the rent were permitted while the landlord was doing repairs to the house. In such a case the rent for which the premises are let is the larger sum.

The deduction is permitted for a temporary period only, and, without being unduly technical, I think it right to construe the agreement as fixing a rent of 275*l.*, subject to a temporary deduction. For these reasons, the standard rent in my opinion is 275*l.* I feel a difficulty about saying that there is any question here of a progressive rent.

This difference of opinion will not affect the result of the case and I have nothing whatever to add to what has been said by my lord and Mackinnon L.J., as to the application of s. 15, sub-s. 1, of the Act.

Appeal dismissed.

Solicitors: *Allen & Overy; Curwen, Carter & Evans.*

H. C. G.

1943
Nov. 23

FIELD *v.* HOPKINSON.

Criminal law—Conviction—Uncertainty—Emergency legislation—Sale of soft fruit otherwise than by retail—Obligation to " keep or cause to " be kept an accurate record "—Soft fruit (Maximum Prices) Order, 1942 (*St. R. & O.*, 1942, *No.* 1138), *art.* 9 (1.).

The respondent was charged under the Soft Fruit (Maximum Prices) Order, 1942, art. 9 (1.) with having failed " to keep or cause " to be kept an accurate record " of purchases and sale and stock as required by the order, and was convicted on the charge as so framed. Quarter sessions quashed the conviction on the ground that it was bad for uncertainty, the respondent having been convicted on an information charging two offences in the alternative :—

Held, that the information charged one offence only, to constitute which it was necessary to prove that the person charged had neither kept a record himself nor caused one to be kept.

CASE stated by Leeds quarter sessions.

At a court of summary jurisdiction, sitting at Leeds, an information was preferred by the present appellant, James Winston Hopkinson, for and on behalf of the Minister of Food, against the present respondent, Thomas Hedley Field, for that he, on July 29, 1942, did commit an offence against reg. 55 of the Defence (General) Regulations, 1939, by infringing an order made under that regulation, namely, the Soft Fruit (Maximum Prices) Order, 1942, in that he, being a person who sold soft fruit otherwise than by retail, failed to keep or cause to be kept such accurate record of purchases and sales and stocks as was required by art. 9 (I.) of the order. The respondent was convicted of the offence as charged. On appeal to quarter sessions, it was contended on his behalf that the conviction was bad for uncertainty, he having been charged with two offences in the alternative, and convicted on that charge. Quarter sessions accepted this contention and allowed the appeal. The appellant now appealed.

Valentine Holmes for the appellant. Quarter sessions were wrong in holding that the conviction of the respondent was bad for uncertainty. A failure to " keep or cause to be kept " an accurate record constitutes one offence only, to establish which it must be proved that the person charged has done neither of the two things.

Alan Pugh for the respondent. The decision of quarter sessions was right. The court will be careful to see that there shall be no possible chance of a person being convicted of alternative offences. In *Rex* v. *Surrey Justices* (1) Avory J. said " It is an elementary principle that an information must " not charge offences in the alternative, since the defendant " cannot then know with precision with what he is charged " and of what he is convicted, and may be prevented on a " future occasion from pleading autrefois convict." That dictum was approved in *Jones* v. *Sherwood* (2). Here, the order itself is framed in the alternative, and if, as a result, the information has to be laid as if it were in the alternative, the person charged must be charged with alternative offences.

VISCOUNT CALDECOTE C.J. This is a reasonably plain case. It is said that the information against, and the conviction of, the respondent was bad for uncertainty. I can express my view in two sentences. If an enactment forbids the doing of act A or act B, it creates two offences and a conviction on one information charging both in the alternative is bad for uncertainty, but if the enactment creates a duty to do either A or B, there must, to constitute an offence, be a failure to do both acts. In my view, quarter sessions were wrong in holding that the conviction of the respondent was bad for uncertainty, and the case must go back for determination on that footing.

(1) [1932] 1 K. B. 450, 452. (2) [1942] 1 K. B. 127.

MACNAGHTEN J. I agree.

TUCKER J. I agree.

Case remitted.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondent: *George A. Herbert, for Willey Hargrave & Co., Leeds.*

P. B. D.

C. A.
1943
Oct. 19, 20;
Nov. 3.

LUBOVSKY *v.* SNELLING.

Insurance (motor)—Admission of liability by insurance company—Writ issued more than twelve months after fatal accident—Subsequent plea by company that claim statute-barred—Fatal Accidents Act, 1846 (9 & 10 *Vict., c.* 93) *s.* 3.

The plaintiff, as administratrix of her husband, claimed from the defendant damages for the death of her husband which had been caused by the defendant's negligence. The defendant was insured against third party risks, and at an interview between the plaintiff's solicitors and a representative of the defendant's insurance company, the latter admitted liability, but said that a writ must be issued so that the judge might, if necessary, fix the quantum of damages. By s. 3 of the Fatal Accidents Act, 1846, the action under that Act must be commenced within twelve months of the death. The plaintiff issued a writ more than twelve months after the death, and the defendant pleaded the statute:—

Held, that the agreement constituted a contract not to plead s. 3 of the statute, and that, consequently the defendant could not do so, and the plaintiff was entitled to recover.

Wright v. *John Bagnall & Sons, Ld.* [1900] 2 Q. B. 240, applied.

APPEAL from Tucker J.

On December 29, 1940, the husband of the plaintiff, who sued as his administratrix, died as the result of injuries caused by the negligent driving of a motor car by the defendant, who was insured against third party liability with the Co-operative Insurance Society, Ld. On July 18, 1941, the plaintiff's solicitors made a claim on the defendant who handed it to the society. In August, 1941, the society sent a representative to negotiate with the plaintiff's solicitors. The representative said that they had no defence and that the negotiations should proceed "on the basis of admission of liability," but that "a writ would have to be issued because, whether they agreed "about the quantum of damages or not, the court would have "to approve it and apportion them, there being another "claimant in respect of personal injuries." There was no other meeting. By s. 3 of the Fatal Accidents Act, 1846, an action under that Act must be commenced within twelve calendar months after the death of the deceased. A writ was issued on November 7, 1941, but, as the plaintiff had not then taken out letters of administration (1), was afterwards withdrawn, and the present writ was issued on February 14, 1942, after the plaintiff had obtained grant of letters of administration, and more than twelve months after the death. By the defence the defendant pleaded that the claim was barred by reason of s. 3 of the statute. Tucker J. gave judgment for the defendant. The plaintiff appealed.

M. Turner-Samuels for the plaintiff. The defendant is estopped from relying on s. 3 of the Act of 1846: *Wright* v. *John Bagnall & Sons, Ld.* (2) which should be read with *Rendall* v. *Hill's Dry Docks, &c., Co., Ld.* (3). The decision of the House of Lords in *Powell* v. *Main Colliery Co., Ld.* (4) does not derogate from the doctrine in *Wright's* case (2). The agreement at the meeting in August, 1941, led the plaintiff to suppose that the defendant would not enforce his strict rights. Therefore he will not be allowed to enforce them—per Lord Cairns in *Hughes* v. *Metropolitan Railway Co.* (5). The defendant waived his rights.

Fox-Andrews for the defendant. The agreement that a writ should be issued meant an effective writ on which a judge would have jurisdiction to quantify and apportion. There was no waiver, for there could not be a waiver of something which was not being considered by the parties. At the time of the agreement there was no liability on the defendant which could be waived. There would only be liability if valid action was brought against him in the terms of the statute—a potential liability. The facts in *Wright's* case (1) were very different, and the case is inapplicable. Secondly, by s. 3 of the Act of 1846 " Not more than one action shall lie for and in respect " of the same subject matter of complaint." One writ having been issued in November, 1941, no second action could be maintained. Lastly, the society's representative could have had no authority to deprive them of a right which at that time had not accrued, namely the right to plead s. 3 of the statute. [*Groom* v. *Crocker* (1) was referred to.]

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(1) See Annual Practice, 1943, p. 181. The statement there made that an administrator cannot sue in the K. B. D. until administration is granted has since the hearing of this case been confirmed by the decision of the Court of Appeal in *Pugall* v. *Moran*, not yet reported.

(2) [1900] 2 Q. B. 240.

(3) [1900] 2 Q. B. 245.

(4) [1900] A. C. 366.

(5) (1877) 2 App. Cas. 439, 448.

Cur. adv. vult.

Nov. 3. SCOTT L.J. read a judgment in which he stated the facts and continued: The sole issue in the appeal is whether it was open to the defendant, in the circumstances of the case, to raise the plea that the plaintiff's claim was barred by s. 3 of the Act of 1846. I have no doubt that the plea was not so open, and to take the point was, in my opinion, discreditable, if not dishonest, on the part of the society. The plain meaning of the agreement made with the representative of the society at the meeting in August, 1941, was that liability in damages to the plaintiff's cause of action for the money loss resulting to the dead man's dependants was once and for all definitely accepted by both the defendant and his insurers, and both of them were thereafter precluded from putting forward any defence whatever which would impeach that liability. It was just as much a contract not to plead s. 3 of the Act, as if that undertaking had been put in words; and the society knew it at the time when it caused that plea to be recorded. That is why I have spoken of their conduct in terms of such grave censure.

The arrangement that a writ should be issued was both natural and necessary. It was natural for the plaintiff's solicitors to be glad to be able, in their negotiation for a suitable figure for damages, to say that, if his reasonable demand was not considered, it should be left to the judge. It was necessary for apportionment that the judge should apportion, but the date of the writ did not matter in the least for either of those purposes. It follows, therefore, that it did not matter for any purpose relevant to this appeal whether the writ in the present proceedings was before or after the lapse of the twelve months from the death. That the society should instruct their solicitor to take the action they did and cause s. 3 of the Act of 1846 to be pleaded shocks me more than

(1) (1938) 54 T. L. R. 861.

I can say. The continuing endeavour at the trial to evade liability, whilst calling no witness to challenge the evidence, makes their conduct worse. The case thus falls wholly within the decision of this court in *Wright* v. *John Bagnall & Sons, Ld.* (1), and that decision is in any case binding on us. The learned judge obviously thought that the meaning of what was said at the August interview fell short of what I feel sure was meant; but I am satisfied that no such reason as that actuated the society. The appeal must be allowed with costs here and below.

MACKINNON L.J. I agree.

GODDARD L.J. I agree with the judgment of Scott L.J., but as we are differing from the learned judge I will add a few words. There was clearly an agreement made by the representative of the defendant's insurance company with the plaintiff's solicitor that liability was admitted, but that the amount of the damages was to be fixed and apportioned by the court. There was, and would be, no question of the authority to make this agreement, and, in my opinion, s. 3 of the Fatal Accidents Act, 1846, does not affect the cause of action but merely prescribes a period of limitation. It in no way differs from the provision in s. 2, sub-s. 1 of the Workmen's Compensation Act, 1897, that the claim for compensation must be made within six months. I can, therefore, see no distinction between this case and that of *Wright* v. *John Bagnall & Sons, Ld.* (1), which is binding on this court. There it was found that the employers had agreed to pay compensation and that each party reserved the right to go to the court to get the amount fixed. Collins L.J. said (2) that there was an agreement that compensation was to be fixed, the only question left open being the amount, which is exactly the case here. " If that " is the case," said the lord justice, " the respondents are " debarred from raising the point that the statutory limitation " applied." Vaughan Williams L.J. concurred as to the existence of the agreement and said (3) " I think the lapse of " time cannot be set up as a bar to the claim." Tucker J. thought that an essential element in that decision was that the appellant had been lulled into a sense of false security and so distinguished it, but I am unable to agree with him.

(1) [1900] 2 Q. B. 240.
(2) Ibid. 244.
(3) Ibid. 245.

C. A.

1943

LUBOVSKY
v.
SNELLING.

Goddard L.J.

Collins L.J. mentioned that consideration as a further ground for holding that lapse of time could not be set up, but his first reason, which was the only one given by Vaughan Williams L.J., remained unqualified. If there could have been any doubt on the subject it was resolved by the next case in the same volume, *Rendall* v. *Hill's Dry Docks* (1) where A. L. Smith L.J. explains in terms the ratio decidendi of *Wright's* case (1), that the parties had agreed that there was a statutory liability on the respondents to pay compensation and that each had reserved the right to go to the court to have the amount determined. The defence now taken is, of course, in fact set up by the Co-operative Insurance Society, and I will say no more than that I regret that in the circumstances they should have taken such a point. I agree that the appeal should be allowed.

Solicitors for plaintiff: *J. H. Milner & Son, for Silverman & Livermore, Liverpool.*

Solicitors for defendant: *L. Bingham & Co.*

W. L. L. B.

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(1) [1900] 2 Q. B. 245.

ASSOCIATED CINEMA PROPERTIES, LIMITED *v.* HAMPSTEAD BOROUGH COUNCIL.

1943
Oct. 29,
Nov. 3.

Rates—Occupation—Empty dwelling-house—No physical possession—Intention to use as offices on the happening of uncertain event.

By an agreement in writing a company took for a term several dwelling-houses so that they might have accommodation available for use as offices in the event of their premises being rendered unfit for use by enemy action or for use "owing to the exigencies of "their business." The company did not use the premises for any purpose, nor enter into physical possession of nor place any furniture or other chattels on the premises at any material time:—

Held, that the company were not in rateable occupation of the premises as they had never been in actual occupation of the same.

Rex v. *Melladew* [1907] 1 K. B. 192, and *Borwick* v. *Southwark Corporation* [1909] 1 K. B. 78 distinguished.

CASE stated by Hampstead justices.

A complaint was made by the respondents, the Hampstead borough council, as the rating authority for the borough of Hampstead, against the appellants, Associated Cinema Properties, Ld., in that they, being duly rated and assessed in respect of two general rates in respect of Nos. 2 and 4 Frognal Close, Frognal, in the sums of 76*l*. 5*s*. 8*d*. and 214*l*. 16*s*., for which lawful demand had been made, had refused or neglected to pay the said sums.

On the hearing of the complaint it was proved or admitted that the rates had been duly made and demanded from the appellants, and the appellants had not paid the same or any part thereof. By an agreement in writing, dated February 10, 1942, Frognal Priory Development Ld. (hereinafter called "the landlords"), agreed to let and the respondents agreed to take certain dwelling houses known as Nos. 1, 2, 3, 4, 5 and 6, Frognal Close, in the borough, at a rent inclusive of rates (which the landlords covenanted to pay), of 1,500*l*. a year, for a term commencing on December 1, 1941, and continuing (i.) as to Nos. 2 and 4 Frognal Close, until the expiration of three months (less the last "three days thereof"), after the cessation of hostilities as thereinafter defined; and (ii.) as to Nos. 1, 3, 5 and 6 Frognal Close, until September 29, 1948 (determinable as thereinafter provided). The said term was subsisting at all material times. By the agreement the appellants covenanted to keep the premises in good and tenantable repair, order and condition, provided that they should not be under any liability for the maintenance, repair or preservation of the premises unless and until they should enter into possession of the same, and in the meantime the landlords were to be at liberty to take such action as they should consider necessary for such maintenance, repair or preservation. The appellants had not entered into physical possession of the premises, and the landlords had taken the steps necessary for the maintenance repair and preservation thereof. The appellants further covenanted not to use the premises or any part thereof otherwise than for private dwelling-houses or the garages in connexion therewith or for emergency offices in connexion with the business of the appellants. The object of the appellants in becoming tenants of the premises was to have accommodation available for offices in the event of their premises being rendered unfit for use by enemy action or should they desire to use the premises owing to the exigencies of their business. The appellants had never used the premises for any purpose. The premises were built as private dwelling-houses, and no steps had been taken to adapt them for use for emergency offices in connexion with the business of the appellants, but they were at all material times capable of being so used without any structural alteration. At no material time had there been any furniture or other chattels in the premises. The justices were of opinion that the appellants were at all material times in occupation of the premises and that a distress warrant could lawfully be issued against them in respect of the rates. The question for the opinion of the court was whether the justices came to a correct determination in point of law, and, if not, what should be done in the premises.

Comyns Carr K.C. and *Squibb* for the appellants. The authorities on what is rateable occupation are numerous but conflicting, and most of them have been subjected to adverse comment in the House of Lords. The cases appear to fall into two categories, namely, those in which the point at issue was whether one of two or more possible occupiers was the real occupier, and those in which the issue was whether any body was in occupation at all. This case falls within the second category. In *Reg.* v. *St. Pancras Assessment Committee* (1) Lush J. said : " The owner of a vacant house is in possession,

(1) (1877) 2 Q. B. D. 581, 588.

1943

ASSOCIATED CINEMA PROPERTIES, LD. v. HAMPSTEAD BOROUGH COUNCIL.

" and may maintain trespass against any one who invades it, " but as long as he leaves it vacant he is not rateable for it as " an occupier." Those observations apply equally to a person who pays rent for a house but leaves it vacant. All the cases where there has been held to be rateable occupation have been decided on the fact that some chattels had been left on the premises by the person sought to be rated. They have no application to the present case where nothing was on the premises and under their agreement the appellants were not liable for repairs until they entered into possession. *Rex* v. *Melladew* (1) and *Bootle Overseers* v. *Liverpool Warehousing Co.* (2), are inconsistent and cannot be reconciled, and the present case is distinct from *Rex* v. *Melladew* (1), where it was held that there was no cessation of occupation. In the present case occupation never began. Moreover, the present case concerns a dwelling-house and not a warehouse, with which the court was concerned in *Rex* v. *Melladew* (1), and a warehouseman might still be carrying on business even though there be nothing stored in his warehouse. *Rex* v. *Melladew* (1) is so contrary to principles laid down in the House of Lords, that it can no longer stand. Further, for a person to be made rateable as occupier, there must be established an intention in him to return to or enter on the premises on an ascertainable date within the period for which the rate is to run. It is not sufficient to show an intention to occupy the premises on the happening of some uncertain event which may or may not happen within the rating year. " Rateable occupation must " include actual possession, and it must have some degree of " permanence : a mere temporary holding of land will not " constitute rateable occupation " : per Lord Russell of Killowen in *Southern Railway* v. *Westminster Assessment Committee* (3). It is difficult to understand how an occupation which has not begun can be said to be either " actual " or to " have some degree of permanence." [*Southend-on-Sea Corporation* v. *White* 4) ; *Staunton* v. *Powell* (5) ; *Allan* v. *Liverpool Overseers* (6) ; *Borwick* v. *Southwark Corporation* (7) ; *Liverpool Corporation* v. *Chorley Union Assessment Committee* (8) ; *Townley Mill Co. (1919)* v. *Oldham Assessment Committee* (9) ;

(1) [1907] 1 K. B. 192.
(2) (1901) 85 L. T. 45.
(3) [1936] A. C. 511, 529.
(4) (1900) 83 L. T. 408.
(5) (1867) 15 W. R. 362.
(6) (1874) L. R. 9 Q. B. 180.
(7) [1909] 1 K. B. 78.
(8) [1913] A. C. 197, 208.
(9) [1937] A. C. 419.

London County Council v. *Hackney Borough Council* (1) and *Bayliss* v. *Chatters* (2), were also referred to.]

Turner K.C. and *Simes* for the respondents. An owner in possession, namely, one who can maintain trespass, is prima facie the occupier of the premises. It is for him to show either that there is another occupier or that there is no occupier: *Holywell Union* v. *Halkyn Drainage Co.* (3). True, that bare ownership with legal possession imposes no liability to rating because the occupation is not beneficial: *Reg.* v. *St. Pancras Assessment Committee* (4); and, as Lopes L.J. said in *Smith* v. *New Forest Union Assessment Committee* (5): "To constitute "occupation under the statute of Elizabeth there must be use "and enjoyment of the property capable of being beneficial," but an occupation of premises coupled with a potential benefit is a beneficial occupation if there is an intention to occupy them at any time. The possibility of physical occupation in case of need is itself the benefit. Intention to occupy is the governing factor. In *Bootle Overseers* v. *Liverpool Warehousing Co.* (6) the court held that the proper inference form the facts was that there was a bona fide intention by the warehousing company not to use the warehouse during the rating year. In *Gage* v. *Wren* (7) a person who had hired a house for three years for the purpose of receiving boarders or lodgers removed her furniture and left the house unoccupied for a portion of the six months for which the rate was made. She intended to return to the house the following summer, and it was held that the proper inference from the facts was that she had the beneficial occupation of the house during the whole time. In *Rex* v. *Melladew* (8) the Court of Appeal held that there had been no cessation of occupation of a warehouse, and that the warehouseman was, therefore, liable for the rates. The warehouseman had given notice that he had gone out of occupation of the warehouse, and it was closed, but he was willing to reopen it if enough goods were offered for storage. Farwell L.J. there said (9) that the test of rateability in the case of business premises was, "Has the person to be rated such use of the "tenement as the nature of the tenement and of the business "connected with it renders it reasonable to infer was fairly

(1) [1928] 2 K. B. 588.
(2) (1940) 38 L. G. R. 185; 32 R. & I. T. 48.
(3) [1895] A. C. 117, 120.
(4) 2 Q. B. D. 581, 588.
(5) (1889) 61 L. T. 870.
(6) 85 L. T. 45.
(7) (1902) 87 L. T. 271.
(8) [1907] 1 K. B. 192.
(9) Ibid 203.

"within his contemplation in taking or retaining it?" In the present case the appellants had such use of the premises as they contemplated when taking them. *Rex* v. *Melladew* (1) cannot be distinguished from the present case on the ground that the premises in that case were a warehouse whereas in the present case they are dwelling-houses. The principle, namely, whether there was an intention to occupy, applies equally in both cases. "What "amounts in law to occupation, must vary according to the "character of the premises in question, the nature of the "holdings, the intention of the alleged occupier, and all the "surrounding circumstances": per Lord Hewart C.J. in *Hackney Borough Council* v. *Metropolitan Asylums Board* (2). Wright J. in holding in *London County Council* v. *Hackney Borough Council* (3) that the plaintiffs were not in beneficial occupation during the rating period, and were, therefore, not rateable, said (4) that the premises "were not being kept "in reserve . . . . as the empty warehouse kept by the "owners as a standby for use at any moment when the "exigencies of their business might make it desirable to so use "it, and in readiness for such use, was kept in reserve." The question of intention was discussed in *Allan* v. *Liverpool Overseers* (5). The principle to be derived from the cases is that the relevant period to be considered is the period of the rate, and if at the beginning of that period there is an intention to occupy the premises on the happening of an event, even though it be uncertain, that intention will convert what would otherwise be a bare occupation into a beneficial and rateable occupation. Intention is a question of fact on which the findings of the justices are conclusive, see per Bigham J. in *Bootle Overseers* v. *Liverpool Warehousing Co.* (6). [*Borwick* v. *Southwark Corporation* (7); *Liverpool Corporation* v. *Chorley Union Assessment Committee* (8); and *Townley Mill Co. (1919)* v. *Oldham Assessment Committee* (9) were also cited.]

Comyns Carr K.C. replied.

VISCOUNT CALDECOTE C.J. This case raises questions of difficulty. It is not easy to arrive at a reconciliation of the authorities or of the reasons which have been given for the

(1) [1907] 1 K. B. 192.
(2) (1924) 131 L. T. 136, 139.
(3) [1928] 2 K. B. 588.
(4) [1928] 2 K. B. 594.
(5) L. R. 9 Q. B. 180.
(6) 85 L. T. 45.
(7) [1909] 1 K. B. 78.
(8) [1913] A. C. 197.
(9) [1937] A. C. 419.

decisions. Lord Atkinson said in *Liverpool Corporation* v. *Chorley Union Assessment Committee* (1): " But the authorities " mainly relied upon by the appellants are those conversant " with the non-rateability of vacant houses. I find great " difficulty in reconciling these, one with the other, from the " statement of the law by Lush J. in *Reg.* v. *St. Pancras* " *Assessment Committee* (2) down to the decisions in *Rex* v. " *Melladew* (3) and *Borwick* v. *Southwark Corporation* (4); and " I find still greater difficulty in discovering any intelligible " principle upon which the decisions are founded, or any " principle applicable equally to vacant houses and to property " like that sought to be rated in the present case." I, therefore, feel that it would be useless to go through all the cases and try to find a straight line upon which to frame my judgment. So, I propose to consider, first, what the question is which we have to consider, and then to approach that question in the light of the facts of the case.

In *Liverpool Corporation* v. *Chorley Union Assessment Committee* (1), Lord Atkinson refers (5) to *Winstanley* v. *North Manchester Overseers* (6) and says it " had reference solely to " the first of the three questions set forth at p. 12 of that report, " into which it was stated the question for decision resolved " itself. These questions were (1.) (the bald question): ' Does " ' the appellant occupy this cemetery for which he is " ' rated?' (2.) ' If he does, is his occupation a thing of " ' value?' (3.) ' What is the measure of that value?' " Very much the same way of looking at the question was adopted in *Townley Mill Company (1919) Ld.* v. *Oldham Assessment Committee* (7), where Lord Maugham says: " There is no doubt " that in order to prove rateable occupation it was necessary " to establish not only occupation, but that the occupation " was a thing of value." It appears, therefore, that the question which we have to consider is whether there is a rateable occupation. Something has been said also about beneficial occupation. Occupation will fail to be rateable occupation if it is of no value to the person who is sought to be charged, but in the present case it is not disputed that, if there is, in fact, occupation here, it is beneficial occupation.

Although it is difficult to find either in the statute of Eliza-

(1) [1913] A. C. 210.
(2) 2 Q. B. D. 581, 588
(3) [1907] 1 K. B. 192.
(4) [1909] 1 K. B. 78.
(5) [1913] A. C. 208.
(6) [1910] A. C. 7.
(7) [1937] A. C. 419, 436.

beth or anywhere else a definition of " rateable occupation," the definition given in the judgment of Lush J. in *Reg.* v. *St. Pancras Assessment Committee* (1), has so often been cited (and cited with approval in the House of Lords) that I may refer to it once more. Lush J. in a considered judgment, said (2): " It is not easy to give an accurate and exhaustive definition of " the word ' occupier.' Occupation includes possession as its " primary element, but it also includes something more. " Legal possession does not of itself constitute an occupation. " The owner of a vacant house is in possession, and may " maintain trespass against anyone who invades it, but as long " as he leaves it vacant he is not rateable for it as an occupier. " If, however, he furnishes it, and keeps it ready for habitation " whenever he pleases to go to it, he is an occupier, though he " may not reside in it one day in a year." It is right to say that occupation is a question of fact. That was made plain in *Holywell Union* v. *Halkyn Drainage Co.* (3), where Lord Herschell said (4): " The question whether a person is an " occupier or not within the rating law is a question of fact, and " does not depend upon legal title."

Several of the cases show (and I will only refer to one of them for this purpose), the decisive nature of the facts when they have been found. The illustration which I have taken is *Smith* v. *New Forest Union* (5), where the Court of Appeal held that there was no evidence of occupation. Lord Esher M.R. said: " The possessor of this land was both legal owner and in " legal possession, but he was not in actual possession. He " never intended to do anything with the land but let it for " building purposes. He put up a board, but he was never in " such occupation as to be rateable under the Statute of " Elizabeth." Lindley L.J. said: " I agree. There was here " no use or enjoyment or occupation." Lopes L.J. said: " To constitute occupation under the Statute of Elizabeth, " there must be use and enjoyment of the property capable of " being beneficial. There is no evidence of any such here, and " I agree with the Divisional Court." The decisive facts there were that the person who was sought to be rated had " never " enclosed, cultivated, used or let" the land. In those circumstances, it is not surprising that the Court of Appeal found no difficulty in arriving at the decision that there was no rateable occupation. I contrast that case with *Borwick* v. *Southwark Corporation* (1), where certain chattels used in connexion with the business of the appellants were removed from a house, but wooden benches and shafting had been installed and fixed there. Lord Alverstone C.J., said (2): "There is no doubt that the appellants can make use of this "property if they choose, and will do so if and when they "require it. I think they are making use of it by having the "necessary shafting and benches upon the premises in readiness "for use . . . . I cannot think, therefore, that there is no "evidence of occupation."

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(1) 2 Q. B. D. 581.

(2) Ibid 588.

(3) [1895] A. C. 117.

(4) Ibid 125.

(5) 61 L. T. 870.

I refer to the facts in the case under consideration to show what the position was. Here it is found that the appellants had not entered into physical possession of the premises, and that the landlords had taken the steps necessary for the maintenance, repair and preservation thereof; that the object of the appellants in becoming tenants of the premises was to have accommodation available for offices in the event of their present offices being rendered unfit for use by enemy action or should they desire to use the premises owing to the exigencies of their business; and that the appellants had never used the premises for any purpose. The difference between those facts and those which Lord Alverstone stated in *Borwick* v. *Southwark Corporation* (1) seems to me very significant. Nothing could be more clear or more precise than the statement that "the "appellants had never used the said premises for any purpose," although it follows a statement that "the object of the "appellants in becoming tenants of the premises was to have "accommodation available" in certain events. This was relied on by counsel for the respondents as proving an intention to occupy the premises which was enough to constitute rateable occupation. The justices express themselves as "satisfied "that the [appellants] acquired these premises for use as "offices in connexion with their business, that the premises "were and are capable of being so used, and that the "[appellants] had and still have an intention so to use them "whenever, according to the exigencies of their business, it "was or is desirable. On the authorities, *Rex* v. *Melladew* (3) "and *Borwick* v. *Southwark Corporation* (1), we are of opinion "that the [appellants] must be held to be the occupiers, and "to be enjoying the benefit of premises kept in reserve for

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(1) [1909] 1 K. B. 78.

(2) [1909] 1 K. B. 82.

(3) [1907] 1 K. B. 192.

" them for use in their business in case of emergency, and, " therefore, rateable." If the two cases mentioned did require the justices to come to that decision, the respondents will succeed. Therefore, it is necessary to look at those two authorities.

I repeat my reference to the judgment of Lord Alverstone C.J. in *Borwick* v. *Southwark Corporation* (1), where he said that the persons there sought to be charged were making use of the premises by having the shafting installed. Bigham J. said (2): " It is, I think, obvious from these circumstances that the " place is kept by the appellants as a ' stand by ' for use at " any moment when the exigencies of their business may make " it desirable to so use it, and is in readiness for such use. " Such a state of things constitutes, in my opinion, a permanent " user so as to create an ' occupation ' . . . . Whether a man " ' occupies ' or not is in each case a question of intention, to " be ascertained with reference to the particular circum- " stances." I find nothing in that case to compel the justices to find as they did. The judgment of Collins M.R. in *Rex* v. *Melladew* (3) requires a little more attention. He says: " It is important to remember, in dealing with " questions of liability to pay rates, that occupation, which is " the basis of liability, necessarily varies with the nature of the " rateable subject-matter. The acts necessary to establish " occupancy of a dwelling-house may be very different from " those which might be required to establish occupation of a " non-habitable hereditament. It is, I think, clear from a " comparison of many authorities, that the intention of the " alleged occupier in respect to the hereditament is a governing " factor in determining the question whether rateable " occupancy has been established." No doubt, Mr. Turner, on behalf of the respondents, is entitled to rely on that as a cogent authority in favour of his submission that the all-important question is whether or not there is an intention to occupy the premises. In *Rex* v. *Melladew* (3) the business of a warehouseman had been carried on, but there were no goods in the warehouse at the material times and it was closed. Certain steps had been taken to indicate that the business would not be carried on there, such as cutting off the water and the removal of weights and scales and trucks, but notwithstanding that it was held that there was no cessation of the

(1) [1909] 1 K. B. 78.
(2) [1909] 1 K. B. 84.
(3) [1907] 1 K .B. 192, 200.

1943

ASSOCIATED CINEMA PROPERTIES, LD. *v.* HAMPSTEAD BOROUGH COUNCIL.

Viscount Caldecote C. J.

occupation of the warehouse by the warehouseman. Looking at the matter from that angle, the Master of the Rolls' statement that the intention of the alleged occupier in respect to the hereditament "is a governing factor in determining the "question whether rateable occupancy has been established" is perfectly accurate, and very much in point on the facts of that particular case. He goes on: "For instance, the "physical presence, actual or constructive, of the alleged "occupant upon the hereditament may be consistent with the "position of licensee or lodger as well as with that of an "occupier in the sense required to establish rateability. "'In order to ascertain this,' says Blackburn J., in *Allan* v. "*Liverpool Overseers* (1), 'we must see what was the intention "'of the parties'." The Master of the Rolls adds (2): "I am "aware that ownership is distinct from occupation, and that "an owner does not make himself rateable by trying to let a "house which he has ceased to inhabit. But the principle "involved in that proposition does not apply to the case of the "tenant of a vacant warehouse who retains control over it for "the purpose of letting storage room . . . . The warehouseman in getting a customer supplies visible evidence of his "own occupation. In the case of the owner who tries to let "the intention is not to occupy. In the case of the warehouseman it is exactly the reverse. It seems to me on the facts "found by the justices, which I need not repeat, that the "intention of the defendant here was as far as possible to "avoid the semblance of occupation while carefully guarding "the substance. He carefully retained"—I emphasize that word—"the control, while his continuous intention was to "utilize the premises for the purpose of his business whenever "the opportunity offered." Farwell L.J. adds something to that, when he says (3): "The test, in a case like the present, "of business premises, appears to me to be, Has the person to "be rated such use of the tenement as the nature of the "tenement and of the business connected with it renders it "reasonable to infer was fairly within his contemplation in "taking or retaining it? . . . Under these circumstances, "I find it impossible to say that the defendant has ever given "up the use of this warehouse or withdrawn it from his business "so as to cease to occupy it within the meaning of the Act. "He has merely kept it as spare room." In my judgment,

(1) L. R. 9 Q. B. 180, 192.

(2) [1907] 1 K. B. 202.

(3) [1907] 1 K. B. 203.

that case does not support the proposition that, if a person acquires possession—if he becomes legal owner in the sense in which Mr. Turner uses the word—of a house and has an intention, which he may or may not communicate to anybody, that at some future time he will occupy it, that is tantamount to rateable occupation.

The importance of intention may be illustrated by what I may call the seaside cases of which two or three examples have been cited to us. One of them is *Gage* v. *Wren* (1), in which Lord Alverstone, C.J. said (2): "I quite agree that if those "things"—that is, fixtures, blinds, meters, floorcloths, etc.—"were left in the house, and if the evidence before the "magistrates was that they were only left with a view of "finding a purchaser or an incoming tenant, the inference of "law to be drawn from that would not be that there was any "evidence of occupation. But the case goes on to say that "the respondent left all the fixtures and fittings she had "hired from the previous tenant, and I will assume that they "were things which might all have been taken by an incoming "tenant . . . . I think that the proper inference of law to "be drawn from the facts is that the respondent had the "beneficial occupation of this house during the whole time. "She intended to come back to the house, and she might come "back, and she made no attempt whatever to dispose of it, "nor is there any evidence at all that she meant to go out of "the beneficial occupation of the house during the year." That case is an illustration of the significance of intention. When a person has been in occupation, an intention to go out, coupled with facts which support the intention, may establish a state of things in which there is no rateable occupation because no use is being made of the premises.

That is really sufficient for the purposes of my judgment, having regard to the finding of the justices that no use whatever was made of these premises either by installing furniture or by any other means. All that the appellants did was to pay 1,500*l.* on the conditions which are set out in the agreement so as to have a stand-by office for use in case the exigencies of their business required it. I find neither in *Rex* v. *Melladew* (3), nor in *Borwick* v. *Southwark Corporation* (4), anything to support the view that the justices were bound to find that there was rateable occupation. I am, therefore, of opinion that the justices came to a wrong conclusion.

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(1) 87 L. T. 271.

(2) Ibid 274.

(3) [1907] 1 K. B. 192.

(4) [1909] 1 K. B. 78.

Charles J. I agree. The whole matter arises on an agreement which was entered into because of the possibility of damage arising from enemy action. That agreement, therefore, is couched in somewhat unusual terms. The appellants covenanted " to keep the said premises in good " and tenantable repair, order and condition, provided that " the appellants should not be under any liability for the " maintenance, repair or preservation of the said premises " unless and until the appellants should enter into possession " of the same and in the meantime the landlords were to be at " liberty to take such steps as they should consider necessary " for such maintenacne, repair or preservation." The justices find that the appellants " had not entered into physical " possession of the said premises and the landlords had " taken the steps necessary for the maintenance, repair and " preservation thereof. The object of the appellants in " becoming tenants of the premises was to have accommodation available for offices in the event of their present " offices being rendered unfit for use by enemy action, or " should they desire to use the said premises owing to the " exigencies of their business." That latter part, one would gather, is by way of addition, because the appellants' main object in entering into the agreement was to have premises available if their existing offices were rendered unfit for use by enemy action. Then it is found: " The appellants had " never used the said premises for any purpose."

It has been said by Mr. Turner that if anyone takes a lease of a house, leaves it a shell, puts nothing into it, and does nothing to it, he is still in beneficial occupation so as to bring him within the ambit of rating if he has the right to go into that empty house at some future time. A long chain of cases has been cited to us from the time of Lord Blackburn down to 1937, but no case is comparable with the present. All the cases cited to us, whether they refer to a factory or warehouse, or to a seaside boarding-house or bungalow, exhibit vital differences from the present case. In the warehouse cases, there had already been a beneficial occupation, but the occupier had abandoned the premises for a time. Sometimes he had left something behind. Sometimes, where the warehouses were in a block containing other warehouses occupied by him, he had transferred the chattels next door, ready for return if and when he should let part of the warehouse. In the seaside boarding-house cases a house is occupied during the season, but is left when the season is at an end, there being an intention to return directly the next season starts. In the case of the bungalows, there were five bungalows and furniture for four which could be shifted about in either of the five or to the display house as was most convenient. Those cases are all based on special circumstances which are in no way akin to the circumstances which we are considering to-day.

What, then, is necessary to constitute beneficial occupation so as to make a house rateable? It is necessary to find actual occupation. There cannot be simply some sort of thought transference from a distance of an intention at some time, and in circumstances which may never arise, to come to a house which the person sought to be charged has, perhaps, never seen and never will see. There must be actual occupation and use, which is the word used in some of the cases. Lord Atkinson, in *Liverpool Corporation* v. *Chorley Union Assessment Committee* (1), says: "When the "statute, therefore, enacts that the occupier of a house "should be rated, it must mean that the person to be rated "shall occupy the house as a house; that is, that he shall "use the house for the purpose of living in it, or sojourning in "it, or working in it, keeping animals in it, storing other chattels "in it, or using it for some such other purpose as houses may "reasonably be devoted to; and that, as a vacant house is "not used for any of these purposes, it is not occupied as a "house within the meaning of the statute." These houses were never occupied within the meaning of the statute. They were never used. Nothing was ever put into them. No preparation was ever made for their use as offices. There had, in short, been no occupation. There was no beneficial occupation, no occupation that makes these houses rateable. When the justices came to the conclusion that they were bound by the decisions in *Rex* v. *Melladew* (2) and *Borwick* v. *Southwark Corporation* (3) (the criticisms of which cases by my Lord I entirely agree with), to come to the conclusion that the appellants must be held to be occupiers, in my opinion, they reached a decision which cannot be supported.

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(1) [1913] A. C. 211.
(2) [1907] 1 K. B. 192.
(3) [1909] 1 K. B. 78.

1943

ASSOCIATED CINEMA PROPERTIES, LD. *v.* HAMPSTEAD BOROUGH COUNCIL.

HALLETT J. I agree. The authorities seem to me to show that to establish rateable occupation there must be (*a*) legal possession (as to which see *Holywell Union Assessment Committee* v. *Halkyn Drainage Co.* (1), (*b*) actual occupation, and (*c*) beneficial occupation. The phrase "actual occupation" was used by Farwell L.J. in *Rex* v. *Melladew* (2), and by Wright J. in *London County Council* v. *Hackney Borough Council* (3). The phrase "actual possession" was used by Lord Russell of Killowen, in *Westminster Corporation* v. *Southern Railway Co.* (4). I agree that, in deciding whether there was an actual occupation by the alleged occupier during the period to which the rate relates, evidence of intention should be taken into account, but, apart from authority, I should have thought it clearly wrong to say that an intention to occupy is the same thing as actual occupation, for the intention to do a thing and the actual doing of it are always obviously different things. It is, however, argued that *Rex* v. *Melladew* (5), *Borwick* v. *Southwark Corporation* (2), and *Bayliss* v. *Chatters* (6), compel me to come to a decision to which I should not otherwise come. It is unnecessary that I should go through those cases, because the principle governing them has been fully examined in the preceding judgments. Suffice it to say that I find nothing in them which forces me to answer the question in this case in a way which I should not otherwise have answered it. I do not think that actual occupation and a mere intention to occupy are the same thing, and I find no authority which necessitates my taking a different view. I, therefore, agree with the judgments which have been delivered.

Appeal allowed.

Solicitors for appellants: *Waterhouse & Co.*

Solicitor for respondents: *P. H. Harrold, Town Clerk, Hampstead.*

(1) [1895] A. C. 117.
(2) [1907] 1 K. B. 203.
(3) [1928] 2 K. B. 588, 599.
(4) [1936] A. C. 511, 529.
(5) [1907] 1 K. B. 192.
(6) 38 L. G. R. 185; 32 R. & I. T. 48.

R. F. S.

CORPORATION OF FOREIGN BONDHOLDERS v. INLAND REVENUE COMMISSIONERS.

1943.
Oct. 14, 15.

Revenue—Income tax—Charity—Corporation of Foreign Bondholders—Object to protect interests of holders of public securities—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 37, *sub-s.* 1 (*b*).

The objects of the Corporation of Foreign Bondholders, incorporated by a private Act, were, " to watch over and protect " the rights and interests of holders of public securities wherever " issued, but especially of foreign and colonial securities issued in " the United Kingdom," and other objects subsidiary thereto. The control of the corporation, which had no shareholders or members, was vested in a council of twenty-one members, with power to increase their number to thirty, seven members retiring annually. Of those appointed in their place, two were appointed by the Central Association of Bankers, two by the London Chamber of Commerce and three by the Council, two at least of whom were required to be bona fide holders of foreign bonds to a nominal value of 5,000*l*. On the winding-up of the corporation its surplus assets were to be devoted to the objects for which the corporation was established or to similar or analogous objects in accordance with a scheme settled or sanctioned by the Board of Trade. The corporation did not give market advice but placed its services at the disposal of any member of the public, whether a bondholder or not, without fee. The corporation derived its income from dividends, rents and agency and other commissions. In some cases, the corporation received remuneration for work done as agent for a debtor government. In no case did it charge a fee for negotiating with foreign debtors, but, as part of the arrangements which it negotiated, it might in some cases recover its expenses :—

Held, that the corporation was not a " body of persons " established for charitable purposes only " within the meaning of s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918.

Inland Revenue Commissioners v. *Yorkshire Agricultural Society* [1928] 1 K. B. 611 distinguished.

CASE stated by the Special Commissioners of Income Tax.

The Corporation of Foreign Bondholders, which was incorporated by the Corporation of Foreign Bondholders Act, 1898, was formed to acquire the accumulated funds (amounting to 100,000*l*. or thereabouts), and to extend the scope, of the Corporation of Foreign Bondholders which was registered on August 1, 1873, under the Companies Acts, 1862 and 1867, as an association limited by guarantee and prohibited from paying any dividend to its members. By

s. 4, sub-s. 1, of the Act of 1898, the objects and scope of the corporation were :—" (*a*) to watch over and protect the rights " and interests of holders of public securities wherever issued " but especially of foreign and colonial securities issued in the " United Kingdom : (*b*) to collect and preserve documents, " statistics, reports, and information of all kinds in respect of " public securities and publish, circulate and render available " the same in a readily accessible form : (*c*) to adopt measures " for the protection vindication and preservation or reservation " of the rights and interests of holders of public securities " either on any default in or on breach or contemplated " breach of the conditions on which such public securities " may have been issued or otherwise and to obtain for such " holders such legal and other assistance and advice as the " corporation may deem expedient : (*d*) to negotiate and carry " out or assist in negotiating and carrying out arrangements " for the resumption of payments in respect of any public " securities in default or re-arranging the terms on which " such securities may in future be held or for converting or " exchanging the same for new securities or for any other object " in relation thereto and for the purpose of effectively " representing the holders of public securities or otherwise to " invite the deposit and undertake the custody of such public " securities and to issue receipts or certificates of the " corporation in the place of securities so deposited . . . ." By s. 6, the control or management of the business and operations of the corporation were vested in a council consisting of twenty-one members, with power to increase the number to thirty. Seven of the members were to retire each year, and their places were to be filled by two members appointed by the Central Association of Bankers of London, two members appointed by the London Chamber of Commerce, and three members appointed by the council, " and of such three " members two at least shall be persons who at or before the " time of their election shall have respectively proved to the " satisfaction of the said council that they are the holders of " foreign bonds to the nominal amount of 5,000*l*." By s. 12, on any winding-up of the corporation the surplus assets of the corporation after discharge of its liabilities were to be applied, first, in payment of 50*l*. to each permanent member of the old corporation who should not have received payment under the provisions of s. 10, and, subject thereto, should be " devoted to the objects or some of them or to objects similar

1943

CORP. OF FOREIGN BONDHOLDERS v. INLAND REVENUE COMMISSIONERS.

"or analogous to those or some of those for which the "corporation is established by this Act in accordance with "a scheme which shall be settled or sanctioned by the Board "of Trade . . . ." The corporation had no shareholders or members. It maintained contact with foreign governments and intervened in the interests of the general body of bondholders of a particular State where there was an actual or anticipated default by that State. It conducted negotiations with foreign government departments and financial bodies abroad, and where necessary or expedient, it acted as paying agent on behalf of foreign governments. It did not give market advice, but placed its services at the disposal of any member of the public, whether a bondholder or not, without fee or reward. The British government recognized the council of the corporation as the body entrusted by Parliament with the duty of representing the interests of the bondholders in all matters arising out of defaults or threatened defaults by foreign governments, States, or municipalities. The corporation derived its income from dividends, rents from a part of the corporation premises which were let, and agency and other commissions. In some cases the corporation received remuneration for work done as agent for a debtor government. In no case did it charge a fee for negotiating with foreign debtors, but, as part of the arrangements which it negotiated, it might in some cases recover its expenses.

The council of the corporation made a claim before the Special Commissioners for the years 1934/5 to 1939/40 for exemption from income tax in respect of investment income under the provisions of s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1928, contending that the objects of the corporation were specific and beneficial to the public and that the corporation was a "body of persons . . . . established for charitable "purposes only," within the meaning of the paragraph. The Special Commissioners held that the safeguarding of the interests of a particular section of the community (namely, foreign bondholders), was not a charitable purpose within the scope of the preamble to the Statute 43 Eliz. c. 4, or within any of the decided cases. They therefore found that the corporation was not a "body of persons established for "charitable purposes only." and refused the claim. The corporation appealed.

Tucker K.C. and *Scrimgeour* for the corporation. It is

1943

CORP. OF FOREIGN BONDHOLDERS v. INLAND REVENUE COMMISSIONERS.

conceded that the words " charitable purposes " must be given the meaning placed upon them by Courts of Chancery. In *Income Tax Special Purposes Commissioners* v. *Pemsel* (1), Lord Macnaghten gave the four categories into which charities might be divided, namely, bodies or trusts for the relief of poverty, the advancement of education or religion, and for other purposes beneficial to the community not falling under the preceding heads. In *In re Macduff* (2), Lindley L.J., quoting the argument of Sir Samuel Romilly in *Morice* v. *Bishop of Durham* (3), described the fourth class of charity as those for the advancement of objects of general public utility, but added that that did not mean that every object of public utility was necessarily a charity. In the present case the objects of the corporation are of general public utility and they are generally beneficial. Thus they are charitable objects. The immediate object of the corporation is one of public utility in that it is to benefit an appreciable section of the community, because the services of the corporation are at the disposal of any member of the public. In addition, however, to benefiting individuals, the corporation ensures that large investments held outside the country are properly safeguarded for the sake of the community as a whole, the provision of " invisible " exports thus being maintained. In determining whether a purpose is generally beneficial it is allowable to look beyond the immediate object to the indirect or ultimate object, and if that is of general public utility, the object is a charitable one within the fourth category given by Lord Macnaghten: *Inland Rev. Commissioners* v. *Yorkshire Agricultural Society* (4).

Sir David Maxwell Fyfe S.-G., *J. H. Stamp* and *R. P. Hills* for the commissioners. The corporation was not established for charitable purposes within the meaning of s. 37, sub-s. 1 (*b*). Neither philanthropic nor patriotic purposes are necessarily charitable, *In re Macduff* (5) and *Attorney-General* v. *National Provincial and Union Bank of England and Others* (6). To discover what is a charitable purpose regard must be had to the preamble of the statute 43 Eliz., c. 4, and to the decision of the Courts of Chancery. Here the purpose was not a charitable one as being beneficial to the community and of general public utility, but was in effect a commercial protection

(1) [1891] A. C. 531, 583.
(2) [1896] 2 Ch. 451, 466.
(3) (1805) 10 Ves. 522, 532.
(4) [1928] 1 K. B. 611.
(5) [1924] A. C. 262.
(6) [1936] 2 K. B. 497.

society. *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* (1) was an entirely different case from the present because, although the members of the society in that instance received personal benefits as members, the principal object of the society was the advancement of agriculture which was beneficial to the community at large. [*Peterborough Royal Foxhound Show Society* v. *Inland Revenue Commissioners* (2) was also cited.]

Tucker K.C. replied.

MACNAGHTEN J. Counsel for the corporation has submitted that the protection of the interests of persons who hold bonds is a charitable purpose and comes within that class of charities which, without being for the relief of the poor, or the advancement of religion or education, are beneficial to the community. He had to concede that the mere fact that the object of a society is beneficial to the community does not necessarily make it a charity, for *Income Tax Special Purposes Commissioners* v. *Pemsel* (3) established once and for all that the words, " charitable purposes " in the Income Tax Acts are not used in a popular sense or in any other sense than that attributed to them by the Courts of Chancery. Counsel for the corporation argued that the purpose for which the corporation was constituted was beneficial to the community because it dealt mainly with foreign debtors who have defaulted or are likely to default on their obligations, and that, for economic and political reasons, it is to the interest, not only of the bondholders, but also of the whole community that such obligations should be observed. This case was, he said, analogous to *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* (1), where it was held that, although the members of the society did get personal benefits from the operations of the society, that was a purpose subsidiary to its main purpose which was the advancement of the science of agriculture and the improvement of agriculture throughout the country. It seems to me that the present case cannot be described as analogous to that case. There the primary object was the advancement of agriculture. Here the primary object is that creditors in this country may get payment of their debts. The Special Commissioners held that the protection of the

(1) [1928] 1 K. B. 611.

(2) [1936] 2 K. B. 497.

(3) [1891] A. C. 531, 583.

1943

CORP. OF FOREIGN BOND-HOLDERS *v.* INLAND REVENUE COM-MISSIONERS.

interests of foreign bondholders is not a charitable purpose within the scope of the preamble of the statute 43 Eliz., c. 4, or within any of the decided cases. I agree with that decision.

Appeal dismissed.

Solicitors for appellants: *Slaughter and May.*
Solicitors for respondents: *Solicitor of Inland Revenue.*

C. G. M.

C. C. A.

REX *v.* OLIVER.

1943
Nov. 8, 10, 24.

Criminal law—Evidence—Onus of proof—Proof of absence of authority—Sentence—Penalty increased after commission of offence.

The appellant was convicted on an indictment charging him, as a wholesaler, with supplying sugar, on various dates in 1940 and 1941, otherwise than under the terms of a licence, permit or other authority granted by the Minister of Food, contrary to reg. 55 of the Defence (General) Regulations, 1939, and art. 2 of the Sugar Control Order, 1940. Quarter sessions, availing themselves of powers given by St. R. & O., 1942, No. 501 (which increased the penalties prescribed by reg. 92 of the Defence (General) Regulations, and later by St. R. & O., 1941, No. 1981), sentenced the appellant to three years' penal servitude and fined him 8,500*l.*

The appellant appealed against conviction and sentence on the grounds (1.) that the prosecution had failed to discharge the onus of proving that he had not a licence, and (2.) that the increased penalties authorized by Or. No. 501 did not apply to an offence complete before that order came into force:—

Held, that the onus was on the appellant to prove that he had a licence, as being a fact peculiarly within his own knowledge, and the prosecution was under no necessity of giving prima facie evidence of the non-existence of a licence.

Semble, the indictment would have been sufficient if it had merely charged the accused with having supplied controlled goods contrary to the provisions of the order:—

Held, further, that the words of art. 1 (1D.) of Or. No. 501 were sufficiently clear and wide to require the court to find that the increased penalties applied to offences already complete.

Buckman v. *Button* [1943] K. B. 405, approved.

APPEAL against conviction and sentence.

On July 9, 1943, at Middlesex Sessions, the appellant, Frank Ephraim Oliver, was convicted on an indictment charging him, as a wholesaler, with supplying controlled goods, to wit, sugar, on various dates in 1940 and 1941, otherwise than under the terms of a licence, permit, or other authority granted by the Minister of Food, contrary to reg. 55 of the Defence (General) Regulations, 1939, and art. 2 of the Sugar Control Order, 1940. On other counts of the indictment he was convicted of selling sugar and other controlled goods at prices in excess of the maximum authorized by orders made under reg. 55 of the Defence (General) Regulations, 1939. The appellant was sentenced to three years' penal servitude and was fined 8,500*l.* and ordered to pay part of the costs of the prosecution.

At the trial the prosecution tendered no evidence that the appellant did not have a licence to supply sugar by wholesale, and the appellant did not give any evidence on his own behalf. In passing sentence, quarter sessions availed themselves of the powers conferred by St. R. & O., 1942, No. 501 (1), which increased the penalties above those prescribed by reg. 92 of the Defence (General) Regulations, 1939, and later by St. R. & O., 1941, No. 1981. Order No. 501 came into operation after the date of the commission of the offences by the appellant, but before the date of his conviction.

Slade K.C. and *Hoy* for the appellant. The conviction of the appellant was wrong. The prosecution gave no evidence that the appellant did not possess a licence, but that was an integral part of their case. *Rex* v. *Scott* (2) shows that the onus in such a case would only be on a defendant where the fact was peculiarly within his knowledge, and here the information could easily have been obtained by the prosecution from official sources. The party in a criminal trial who alleges an unlawful act must prove it: *Williams* v. *East India Co.* (3); *Elkin* v. *Jansen* (4); *Abrath* v. *North Eastern Rly. Co.* (5); and

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(1) St. R. & O., 1942, No. 501, art. 1 (1D):—" Any person guilty " of an offence against this regula- " tion [reg. 55 of Defence (General) " Regulations, 1939] being a " breach of the control or an " offence referred to in paras. (1B) " or (1C) of this regulation shall " be liable . . . on conviction on " indictment " to a fine or imprisonment or to both fine and imprisonment.

(2) (1921) 86 J. P. 69.

(3) (1802) 3 East, 192, 195

(4) (1845) 13 M. & W. 655, 661.

(5) (1883) 11 Q. B. D. 440, 457.

C. C. A.
1943
REX
v.
OLIVER.

Hire Purchase Furnishing Co. v. *Richens* (1). [HALLETT J. referred to *Rex* v. *James* (2) and *Rex* v. *Audley* (3).] As to sentence, the increased penalties provided by St. R. & O., 1942, No. 501, cannot be imposed on the appellant. The order came into force after the commission of the alleged offences, and it is not retroactive. *Buckman* v. *Button* (4), a decision of a Divisional Court to the contrary effect, was wrongly decided, and should be over-ruled. Ex post facto criminal laws are peculiarly undesirable. In any case, the order is ambiguous. It can be read retrospectively or prospectively, and should, therefore, in accordance with the canons of construction, be read prospectively. Every statute which takes away or impairs rights acquired under existing laws, creates a new obligation, or attaches a new disability in respect of transactions or considerations already past, must be presumed to be intended not to have a retrospective effect : Maxwell's Interpretation of Statutes, 8th Ed., p. 190. It would be a gross injustice to increase the penalty for an offence previously committed unless it is expressly provided for in the statute. See also per Wright J. in *In re Athlumney* (5). Order No. 501 creates two new offences, and that is an additional argument against its being retrospective. Moreover, a distinction is to be drawn between the phraseology of this Order and that of the order dealt with in *Director of Public Prosecutions* v. *Lamb* (6).

Sir D. Maxwell Fyfe, S.-G. and *F. D. Levy* for the Crown. If a statute lays down that an act is prohibited except in the case of persons who are excepted, the onus is on the defendant to prove that he is within the excepted class. There is a good deal of modern support for Lord Ellenborough's judgment in *Rex* v. *Turner* (7) ; see *Rex* v. *Payne* (8), *Rex* v. *James* (9) ; and *Williams* v. *Russell* (10). The civil cases cited on behalf of the appellant are not in the least hostile to the principle contended for by the prosecution. On the question whether the increased penalties are retroactive, Humphreys J. in *Director of Public Prosecutions* v. *Lamb* (6) was really saying :— that the words of the order are clearly and unambiguously

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(1) (1887) 20 Q.B.D. 389.
(2) [1902] 1 K. B. 540.
(3) [1907] 1 K. B. 383.
(4) [1943] K. B. 405.
(5) [1898] 2 Q. B. 547, 552.
(6) [1941] 2 K. B. 89.
(7) (1816) 5 M. & S. 206.
(8) [1906] 1 K. B. 97.
(9) [1902] 1 K. B. 340.
(10) (1933) 149 L. T. 190, 191.

C. C. A.

1943

REX
v.
OLIVER.

related to the time of conviction and not to the time of the committal of the offence, and entitled quarter sessions to pass the sentence which they did pass in the present case. If the words of the order are not quite clear then it is for the court to consider whether the order is intended to safeguard public interest, and to weigh that consideration against the general canons of construction. [He was stopped.]

Cur. adv. vult.

Nov. 24. VISCOUNT CALDECOTE C.J. read the judgment of the court (Viscount Caldecote C.J., Macnaghten J, and Hallet, J), in which he stated the facts and continued: The first point taken by counsel for the appellant before us was that the prosecution had not discharged the onus of proof which rested on the prosecution to show that the appellant had no licence to supply sugar. The material provisions are contained in the Sugar (Control) Order, 1940, art. 2 which is as follows: " Subject to any directions given or except under " and in accordance with the terms of a licence, permit or other " authority granted by or on behalf of the Ministry no . . . " wholesaler shall by way of trade . . . . supply . . . . any " sugar." The point is wholly without merits, inasmuch as no one knew better than the appellant whether he had a licence or not. None the less, the point requires consideration, particularly in view of certain decisions to which our attention was called. The appellant did not give evidence, and, indeed, we were told by Mr. Slade that he was not called by him because of this very point of the licence. If the appellant was in a position to say that he had a licence, he had a complete answer to the charges made against him under some of the counts. The learned deputy-chairman of the Middlesex Sessions, in summing up, told the jury that the onus of proving that the appellant had a licence was on the appellant and that they must accept his direction that the appellant had no licence, in view of his silence. There is direct authority on this point. In *Rex.* v. *Scott* (1) a similar question arose upon an order made under the Dangerous Drugs Act, 1920, which provided that no person should supply any of the specified drugs unless he was licensed by the Secretary of State to supply the drug. The point was taken at the close of the case for the prosecution that there was no evidence that the defendant was an unauthorized person. Swift J. held that,

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(1) 86 J. P. 69.

C. C. A.
1943
Rex v. Oliver.

if the defendant were licensed, it was a fact which was peculiarly within his own knowledge, and there was no hardship on him in being put to the proof. He said: "It might be very "difficult or impossible for the prosecution satisfactorily to "prove that he did not possess any one or other of the qualifications which might entitle him to deal with the drug. But "the defendant could prove without the least difficulty that "he had authority to do it." Unless we are satisfied that this decision is clearly wrong, we should think it our duty to follow the decision of Swift J.

Mr. Slade's contention that the prosecution must, at least, give enough evidence to prove a prima facie case, was said by him to be supported by the decisions in a number of cases, the first of which was *Williams* v. *East India Company* (1). In that case the plaintiff, by his declaration, said that the defendants, who had chartered his ship, put on board a dangerous commodity without due notice to the captain, and it was held that it lay on the plaintiff to prove the negative averment. Lord Ellenborough C.J. said (2): "the rule of "law is, that where any act is required to be done on the one "part, so that the party neglecting it would be guilty of a "criminal neglect of duty in not having done it, the law "presumes the affirmative, and throws the burden of proving "the contrary, that is, in such case of proving a negative, on "the other side." The Court of King's Bench held that the plaintiff had not given sufficient prima facie evidence of the want of a notice to have gone to a jury. They held that the best evidence should have been given of which the nature of the thing was capable, and that the best evidence was that which the persons immediately and officially employed in the delivery and the receiving of the goods on board could have given. *Elkin* v. *Janson* (3) was an action on a policy of marine insurance in which the defendant pleaded that the plaintiff wrongfully concealed certain facts material to the risk. Parke B., said that, although the allegation of the defendant was negative in its terms, still, as it was the duty of the assured to make that communication, some evidence ought to have been given by the defendant to show that the material communication was not made to him. In *Abrath* v. *North Eastern Railway Co.* (4), Bowen L.J., dealing with an action for malicious prosecution, said that in such an action the

(1) 3 East, 192, 199.
(2) Ibid. p. 199.
(3) 13 M. & W. 655.
(4) 11 Q. B. D. 440, 457.

plaintiff has the burden throughout of establishing the want of reasonable or probable cause for instituting the prosecution. "In one sense, that is the assertion of a negative, and we have "been pressed with the proposition that when a negative is to "be made out the onus of proof shifts. That is not so. If the "assertion of a negative is an essential part of the plaintiff's "case, the proof of the assertion still rests upon the plaintiff." Another citation was made from a judgment of Bowen L.J. in *Hire Purchase Furnishing Co.* v. *Richens* (1): "There is a "broad principle that where a defendant is attempting to "set aside a transaction for illegality, and the facts connected "with it are equally consistent with the transaction being legal "or illegal, it lies on the defendant to prove the illegality." Lastly, in *Rex* v. *James* (2), Lord Alverstone C.J. stated "the substance of the authorities" as follows: "It is not "necessary for the prosecution to negative a proviso, even "though the proviso be contained in the same section of the "Act of Parliament creating the offence, unless the proviso "is in the nature of an exception which is incorporated directly "or by reference with the enacting clause, so that the enacting "clause cannot be read without the qualification introduced "by the exception."

We do not think that these various passages are authorities for Mr. Slade's contention in the circumstances of the present case. There seems to us, indeed, no reason why an indictment should not have been framed without the averment that the supply was otherwise than under and in accordance with the terms of a licence granted by the Ministry of Food. It would have been sufficient, in our judgment, merely to charge the appellant with having supplied controlled goods contrary to the provisions of the order. The appellant's answer would then be in the nature of a confession and avoidance, assuming the fact to be that he had a licence to supply. We are not impressed with the argument based on the form of the order. With the greatest respect to the judgment of Lord Alverstone in *Rex* v. *James* (2), it seems to us to be very difficult to make the result depend on the question whether the negative is of a proviso or of an exception. We think it makes no difference at all that the order was drafted as it now appears instead of being in a form which absolutely prohibits the supply of sugar except as thereinafter provided, with a later clause providing that if a person is supplied under

(1) 20 Q. B. D. 389.

(2) [1902] 1 K. B. 540, 545.

a licence he should be excused. In *Williams* v. *East India Co.* (1), the offence was putting on board a dangerous commodity without due notice. Although in form the words "without due notice" import a negative, the plaintiff's allegation was positive, namely, that the articles were put on board without due notice, and the plaintiff was under the necessity of proving his case. In *Elkin* v. *Janson* (2), the action on the policy was bound to succeed if it had not been for the assertion by the defendant of non-disclosure, on proof of which he would be entitled to succeed. There the case made by the defendant was that there was no disclosure of material facts. What he asserted he must prove, and if he gave no evidence his case failed. As to the test suggested by Bowen L.J., namely, that when the assertion of a negative is an essential part of the plaintiff's case the proof of the assertion still rests on the plaintiff, it seems to us in this case that it was not a necessary part of the case for the prosecution to assert or prove a negative. The prosecution had a complete case when proof had been given that there had been a supply by the appellant unless and until the appellant could escape the prohibition contained in the order by proving the facts which were necessary to his case. Support for this proposition is to be found in the judgment of the Court of King's Bench in *Rex* v. *Turner* (3). Bayley J. said: "I have always "understood it to be a general rule, that if a negative averment "be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it "lies, and who asserts the affirmative, is to prove it, and not "he who avers the negative." In Hawkin's Pleas of the Crown, 7th ed. (Vol. 2, p. 460, c. 89, s. 17) the following passage under the heading "on embezzling naval stores" occurs: "It "seems also agreed, that although the indictment state that "the prisoner 'then or at any time before, not being a con-"'tractor with or authorised by the principal officers or com-"'missioners of our said lord the king, of the navy, ordnance or "'victuallers or victualling office, for the use of our said "'lord the king, to make any stores of war etc.' yet that it is "not incumbent on the prosecutors to prove this negative "averment, but that it is incumbent on the defendant to show, "if the truth be so, that he is within the exception in the "statute."

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(1) 3 East, 192.

(2) 13 M. & W. 655.

(3) 5 M. & S. 206.

The latest case to which our attention was called in this connexion was *Williams* v. *Russell* (1), where Talbot J. said: "On the principle laid down in *Rex* v. *Turner* (2) and numerous "other cases, where it is an offence to do an act without lawful "authority, the person who sets up lawful authority must "prove it, and the prosecution need not prove the absence "of lawful authority. I think the onus of the negative "averment in this case was on the accused to prove the "possession of the policy required by the statute." In the circumstances of the present case we are of opinion that the prosecution was under no necessity of giving prima facie evidence of the non-existence of a licence.

The appellant also appeals against his sentence. The deputy-chairman, in passing sentence, availed himself of the provisions of art. 1 (1D) of St. R. & O., 1942, No. 501, which prescribe penalties far exceeding those originally prescribed by reg. 92 and later by St. R. & O., 1941, No. 1981. Article 1 (1D) was first inserted in the regulation by St. R. & O., 1942, No. 501, which came into operation on March 23, 1942, that is to say, after the offences in question in this case had been committed, but before the appellant's guilt of them had been established. The contention on behalf of the appellant was the same as that advanced by counsel on behalf of the appellant in *Buckman* v. *Button* (3), where the same article was under consideration. It was there, as here, contended that, the offence having been committed before the date of the coming into operation of the order, the increased penalties could not be imposed. We do not doubt in any way the correctness of the argument that where an enactment alters the rights of persons or creates fresh liabilities the enactment ought not to be held to be retroactive unless the language is quite unambiguous and clear. We, therefore, look at the relevant terms of the paragraph which has been inserted by order No. 501 in the regulation. It provides as follows: "Any person guilty of an offence against this regulation being "a breach of the control or an offence referred to in para. (1B) "or (1C) of this regulation, shall be liable . . . . (*b*) on con-"viction on indictment to" certain penalties. The contention on behalf of the appellant was that, although the words "any "person guilty of an offence" are capable of including a person who has committed an offence before the making of the order, yet the words are not so clear as to require this construction

(1) 149 L. T. 190.
(2) 5 M. & S. 206.
(3) [1943] K. B. 405.

C. C. A.
1943
REX v. OLIVER.

necessarily to be placed on them, and that, therefore, they ought not to be held to operate retroactively. The judgments of the Divisional Court in *Buckman* v. *Button* (1) deal with precisely this same point, but we were invited by Mr. Slade to say that those judgments were wrong. It was there held that the paragraph was clear and unambiguous, and that the justices in that case acted correctly in imposing penalties consistent with it, notwithstanding the fact that this gave the paragraph a retroactive effect. Charles J. referred to the decision of the Divisional Court in *Director of Public Prosecutions* v. *Lamb* (2). In that case also the law as to the penalties in the circumstances of the case had been altered after the commission of the offence, but at a date considerably before the laying of the informations, and to a greater extent before the hearing of them. Humphreys J. thought that the language of the Order in Council in question in that case was "perfectly "plain." The words of the order were as follows: "Where "any person is convicted of an offence against these regula-"tions." Similarly, we think that the words of the paragraph which we have to construe when read in accordance with the rule of construction contended for by Mr. Slade, are wide enough and clear enough to require us to hold that they have the effect contended for by the prosecution. In other words, we agree with the decision of the Divisional Court in *Buckman* v. *Button.* (1)

We were pressed with statements contained in Maxwell's Interpretation of Statutes, 8th ed., p. 190, following a quotation from the judgment of Wright J. in *In re Athlumney* (3): "It "is chiefly where the enactment would prejudicially affect "vested rights, or the legality of past transactions, or impair "contracts, that the rule in question prevails. Every statute, "it has been said, which takes away or impairs vested rights "acquired under existing laws, or creates a new obligation, "or imposes a new duty, or attaches a new disability in respect "of transactions or considerations already past, must be "presumed, out of respect to the legislature, to be intended "not to have a retrospective operation." We accept this statement, for which authority is to be found in many cases, some of which were cited to us: see *In re Pulborough School Board, Bourke* v. *Nutt* (4), and *Barber* v. *Pigden* (5). Our

(1) [1943] K. B. 405.
(2) [1941] 2 K. B. 89.
(3) [1898] 2 Q. B. 547, 552.
(4) [1894] 1 Q. B. 725, 737.
(5) [1937] 1 K. B. 666, 673.

decision is based on the language of the paragraph we have to construe. For that reason it is unnecessary to rely on any distinction of principle between words which create new offences and words which increase the penalties for offences already committed. We dismiss the appeal both against conviction and against sentence.

Appeal dismissed.

Solicitors for appellant: *Franklins.*

Solicitor for Director of Public Prosecutions: *Treasury Solicitor.*

A. W. G.

KNOTT *v.* BLACKBURN AND ANOTHER.

1943
Nov. 23.

Vagrancy—Rogue and vagabond—Being found in "enclosed area"—Railway sidings—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.

The respondents were charged under s. 4 of the Vagrancy Act, 1824, with being found in an "enclosed area" for an unlawful purpose. The place in question consisted of railway sidings, about 200 yards long, with lengths of track terminating in stop blocks at one end and, at the other end, joining the main lines of the railway. The sidings were fenced on every side except across the lines of rails:—

Held, that the sidings did not constitute an "enclosed area" within the meaning of s. 4.

Per Viscount Caldecote C.J. "Area" in s. 4 means that part of the basement of a house which is open to the air and has been excavated for the purpose of building a house on the site.

Macnaghten J. reserved for consideration the question whether the words "enclosed area" might apply to an enclosure not connected with a house.

Tucker J. reserved the question whether "area" must always denote an excavated piece of land.

CASE STATED by Warrington justices.

An information was preferred by the appellant, Thomas George Knott, an officer of the London, Midland and Scottish Railway police, against the respondents, Arthur Blackburn and Clifford Taylor, charging them jointly under s. 4 of the Vagrancy Act, 1924(1), for that they on Feb. 12, were found in an enclosed area, to wit, Dallam Railway Sidings, at 9.5 p.m., for an unlawful purpose.

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(1) By Vagrancy Act, 1824, s. 4 ". . . every person being "found in or upon any dwelling-"house, warehouse, coach house, "stable or outhouse, or in any "inclosed yard, garden or area, "for any unlawful purpose . . ., "shall be deemed a rogue and "vagabond . . ."

The respondents were employees of the railway company, but neither was on duty at the time of the alleged offence, and neither had any lawful occasion to be there on the sidings. The sidings were some two hundred yards long, and contained lengths of track terminating in stop blocks at one end and, at the other end, joining the main lines of the railway. The sidings were enclosed by fences as far as practicable except across the lines of rails, and they formed part of a larger space belonging to the railway company which was enclosed on all sides. The justices were of opinion that the sidings were not an "enclosed area" within the meaning of s. 4 of the Vagrancy Act, 1824. They held that "area" in the section was not a general term, but must be construed ejusdem generis with, and as a space akin to, a yard or garden attached to or within the curtilage of a specified building, and that in the section, the word bore the special meaning of a basement area. They, accordingly, dismissed the charge against the respondents. The appellant appealed.

Vernon Gattie for the appellant. The justices were wrong in holding that "area" in s. 4 does not cover the sidings. There is no authority on the meaning of the word "area," but it is submitted that it is not to be construed ejusdem generis with garden or yard. In Murray's Dictionary, "area" is defined as a vacant piece of ground, a level space not built over or otherwise occupied, an enclosed court (especially a sunken court) shut off from the pavement by railings, the amount of surface contained within given limits, and superficial area. The word in s. 4 should be given its usual and wider sense, for, in its context in the section, it is giving the word too narrow a meaning to say that it must relate to an area attached to a house since area is a much wider word than yard or garden. In *Reg.* v. *Esmundson* (1), where the words of the Act in question were "any dwelling-house, out-house, "yard, garden or other place," "place" was held to include a warehouse a mile and a half from the dwelling-house.

The respondents were not represented.

VISCOUNT CALDECOTE C.J. The sidings with which we are concerned in this case are, I gather, in no way different from

(1) (1859) 28 L. J. M. C. 213.

the ordinary railway sidings with which we are all familiar. There is, apparently, no authority as to the precise significance of the word " area " in the section, and we were informed that different meanings have been given to it in various parts of the country when charges have been preferred under the section. It appears to me that in 1824, when the Act was passed, the word " area " would not have been used in the context in which it appears in the section, to describe the large spaces surrounded by ring fences which at that time were frequently to be found all over the country. The words " yard " and " garden " which precede the word " area " in the section, are plainly words of a very limited scope. A garden might, at the most, include a small number of acres, but the railway company has urged that the word " area " can apply to an enclosed space however large it is. Having regard to the use of the words " yard " and " garden " immediately before the word in question here, and bearing in mind that this is a penal section, I think that the word " area " should be construed in the sense given to it by the justices. The use of the word " area " to denote that part of the basement of a house which is open to the air was formerly very familiar, and, indeed, is familiar to most people to-day. It is commonly used to denote the open space below the level of the ground which has been excavated for the purpose of building a house on the site, and the justices came to the conclusion that that was the sense in which the word is used in s. 4 of the Vagrancy Act. I think that that interpretation is right, and I will only say that, if the view I have expressed is not the right one, either the use of the word " area " in the section is inapt, or the words " yard " or " garden " are unnecessary since it would have been sufficient to say: " in or upon any dwelling-house . . . . or in any enclosed area." The appeal should be dismissed.

MACNAGHTEN J. I am of the same opinion. The word " area " in the Vagrancy Act, 1924, used in connexion with the word " garden " plainly includes a place described as a basement-area, a well-known feature of dwelling-houses at the time when the Vagrancy Act was passed. I have no doubt that these sidings could not be described as an "enclosed area." They were not, in fact, enclosed. Whether the words " enclosed area " might apply to an enclosure not connected with a house, I should prefer to leave open for consideration.

1943

KNOTT
v.
BLACKBURN.

TUCKER J. I agree. Mr. Gattie admits that to succeed he must show that the word "area" in s. 4 is really the equivalent of the word "space" and that it would include a large park. Having regard to its context in the section, it is impossible to give the word that wide meaning, and, if that cannot be done, the word is inapplicable to the facts of this case. I am, therefore, of opinion that the justices were right, although I should desire to reserve consideration of the question whether an area must always be an excavated piece of land.

Case remitted.

Solicitors for appellant: *Alexander Eddy.*

P. B. D.

C. C. A.

1943
Nov. 3.

REX *v.* LECKEY.

Criminal law—Summing-up—Misdirection—Silence by prisoner after having been cautioned by police—Suggestion by judge that evidence of guilt.

A police officer making inquiries into the death of a woman, cautioned the appellant and said: "Do you care to give me an "account of your movements late that day?" The appellant replied: "I was with the girl. I want to be fair to you and to "myself, and before I make a statement I should like to get "advice." Later, the appellant, having been charged with the murder of the woman, was given a formal caution by a police officer to which, after some hesitation, he replied: "I have "nothing to say until I have seen someone, a solicitor." At the trial of the appellant the judge commented adversely on the appellant's silence after he had been cautioned by the police officers, and indicated that the appellant's failure then to declare his innocence was a consideration for the jury tending to prove his guilt:—

Held, that this comment was misdirection which would justify quashing the conviction.

Rex v. *Naylor* [1933] 1 K. B. 685, applied.

APPEAL against conviction.

The appellant was convicted before Singleton J., at the Central Criminal Court of murder and was sentenced to death.

On June 30, 1943, Detective-Superintendent Smeed, with

Detective-Inspector Pierce, both of the Kent county constabulary, saw the appellant, who was detained at Marylebone police station. Smeed, in his evidence at the trial, said that he told the appellant who they were and that they were making inquiries about the death of a young woman named Mrs. Trayler whose body had been found in an empty shop at Folkestone on Thursday, June 17, 1943. The appellant replied " I know about it." Smeed then said : " She was last " seen in company with a soldier and inquiries show that she " was murdered on Whit-Sunday night, June 13, 1943." He cautioned the appellant and said : " Do you care to give " me an account of your movements late that day ? " The appellant replied : " I was with the girl. I want to be fair to " you and to myself, and before I make a statement I should " like to get advice." Smeed then told him he would be taken to Folkestone on suspicion of murdering Mrs. Trayler. The appellant made no comment. In cross-examination, Smeed said that he did not give the appellant the formal caution given after a charge, the words of which were : " Do you wish to say " anything in answer to the charge ? You are not obliged to " say anything unless you wish to do so, but whatever you say " will be taken down in writing and may be given in evidence," but he told the appellant that he was not obliged to make a statement unless he wished and that anything he said might be given in evidence. Pierce in his evidence said that on June 30, he took the appellant to Folkestone where he cautioned him and then asked him if a uniform (produced) was that which he was wearing on Sunday, June 13, and again on Friday, June 18. The appellant examined the uniform and said : " Yes." At 6.50 p.m. the appellant was charged with the murder of Mrs. Trayler. After the charge he was given the formal caution and, after some hesitation, replied " I have " nothing to say until I have seen someone, a solicitor." Singleton J., in his summing-up, said : " On June 30, Detective-Inspector Pierce, of the Kent county constabulary, saw the " accused and he found on him a large number of things. He " said that on that evening he charged the accused with this " offence, and cautioned him, and the accused said : 'I've " 'nothing to say until I've seen someone, a solicitor.' Again, " members of the jury, I draw your attention to the fact, as " was emphasized by the defence, that this man was apparently " always cool and collected. If a man is charged with murder " and is not responsible, if he has not committed murder or

C. C. A.
1943
REX
v.
LECKEY.

"anything like murder, what do you expect him to say? "Would you expect him to deny it? According to the "inspector, what the accused said was: 'I've nothing to "'say until I've seen somebody, a solicitor.' Of course, "members of the jury, he is not bound to say anything, but "what would you expect?" A little later in the summing-up, after repeating the evidence of Detective-Superintendent Smeed, as to his interview with the appellant on June 30, the judge said: "Again, as I have said before, it is not "necessary for a man to say anything on such an occasion, but "is it not a little difficult to see why, if a man is asked to "account for his movements and told what the inquiries are "being made for, he should not say: 'I did not murder the "'girl. When I left her she was all right,' if that be the fact?" Almost at the end of the summing-up the judge said: "It "may well be that the coolest and most calculating man "ordinarily would get into a panic if he thought he might be "charged with murder or thought he might be asked questions, "but can you understand how it comes about, if he be innocent "of the charge made against him, that he never said: 'I did "'not murder the girl. When I left her she was perfectly all "'right'?"

Casswell K.C. and *Harold Brown* for the appellant. The trial judge commented adversely on the silence of the appellant on an occasion when the police officer had given him the customary caution which included the words: "You are not "obliged to say anything unless you wish to do so." In effect, the judge said that, if a man in the position of the appellant, after being cautioned by the police says: "I reserve my "defence," that fact may be relied on as evidence that he is responsible for the crime. Such a comment is misdirection: see *Rex* v. *Whitehead* (1); *Rex* v. *Charavanmuttu* (2); where it was held that the silence of accused persons after they had been charged and cautioned by a police officer was not corroboration of evidence of their guilt. In *Rex* v. *Naylor* (3), a prisoner in reply to the formal caution contained in s. 12, sub-s. 2, of the Criminal Justice Act, 1925, given to him before magistrates in the police court before his committal for trial—similar words to those addressed to the appellant in this case, after he was charged—said: "I do not wish to say anything, except that "I am innocent." At the subsequent trial, a recorder at quarter sessions commented unfavourably to the jury on this reply, saying that one would have expected the prisoner to make his defence then and there. This was held to be misdirection, and the conviction was quashed. In *Rex* v. *Littleboy* (1) the court held that, where an alibi is for the first time raised at the trial, it may be proper for the judge to direct the jury that the failure to disclose that defence in time to afford an opportunity for its being tested is to be borne in mind in considering the value of the defence and *Rex* v. *Naylor* (2) was distinguished. If, when the caution is given, either in the police court before committal for trial, or by a police officer to a person whom he has made up his mind to arrest and charge, or to a person when charged, and the person cautioned makes no reply, adverse comment can be made at the trial by the judge on the prisoner's silence, the caution becomes nothing but a trap, an explicit invitation to do something which may result in prejudicing the prisoner's chances in the subsequent trial. Singleton J.'s comment on the appellant's silence was made on three occasions in his summing-up, and the jury must have been influenced by it to the prejudice of the appellant.

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(1) (1928) 21 Cr. App. R. 23.
(2) (1930) 22 Cr. App. R. 1.
(3) [1933] 1 K. B. 685.

Flowers K.C., *Byrne* and *Gerald Howard* for the Crown. *Rex* v. *Whitehead* (3) and *Rex* v. *Charavanmuttu* (4) deal only with the question whether the silence of the accused after caution is corroboration. The language used in the judgment in *Rex* v. *Naylor* (2) is wide in its terms, but in *Rex* v. *Littleboy* (5) Lord Hewart C.J. said regarding the decision in *Rex* v. *Naylor* (2): " It is important to observe that in that " case the fact that the appellant had not disclosed his defence " at an earlier date was employed as being evidence against " him in corroboration of an alleged accomplice, who had " given evidence for the prosecution. It is important to " remember that the judgment in that case was given with " reference to those facts." The jury here were warned both by counsel for the prosecution and for the defence that the fact that the appellant kept silent after he was cautioned by the police officers should not be used against him.

Casswell K.C. replied.

The judgment of the court (Viscount Caldecote C.J., Charles J. and Hallett J.), was delivered by

(1) (1934) 24 Cr. App. R. 192.
(2) (1933) 1 K. B. 685.
(3) (1928) 21 Cr. App. R. 23.
(4) (1930) 22 Cr. App. R. 1.
(5) 24 Cr. App. R. 192, 196.

C. C. A.

1943

REX
v.
LECKEY.

VISCOUNT CALDECOTE C.J., who, after stating that there was no substance in other grounds of appeal, said: In the course of his summing-up to the jury Singleton J., thrice commented on the silence of the appellant after he had been cautioned by a police officer, and it is argued that those comments amounted to such misdirection as should lead this court to quash the conviction.

This subject has been dealt with more than once by this court. In *Rex* v. *Whitehead* (1), Lord Hewart C.J., in dealing with a case of a conviction for unlawful carnal knowledge of a girl under the age of sixteen, said: " When the police officer " served the summons, he cautioned the appellant in the usual " way, and the appellant said: ' I do not want to say anything " 'about it now,' and the jury were directed that it was for them " to decide whether there was corroboration or not according as " they thought whether a respectable man would or would not " deny such a charge; if they thought the failure on appellant's " part to make a denial when the charge was sprung upon him " by the police officer corroborated the girl's evidence then " they would probably accept more readily that evidence as " being corroborated to that extent. This is a misdirection," and he then went on to say the conviction must be quashed. In *Rex* v. *Charavanmuttu* (2), a case of a conviction for indecent conduct towards two boys, Lord Hewart C.J., in dealing with what had been treated at the trial as evidence of corroboration, said: " It is quite clear that three matters were treated, if not " indeed, as being evidence of corroboration, as being matters " which tended to support the evidence of the boys. One was the " silence of the accused at the time when the charge was made " —silence amounting to this, at any rate, that at the stage " then reached he said he reserved what he had to say. It is " true that this remark was not treated as corroboration " under the name of corroboration, but at the close of the " summing-up the incident was brought prominently to the " attention of the jury as something which might help them on " the main question. It would be unfortunate if the jury " thought that mere silence of the accused might amount to " corroboration, for it is well settled since the decision in " *Rex* v. *Whitehead* (3) that it could not be." Those two cases, I observe, were dealing with the question of corroboration, corroboration being needed, or, at any rate, desirable in such cases.

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(1) 21 Cr. App. R. 23, 24.

(2) 22 Cr. App. R. 1, 4.

(3) 21 Cr. App. R. 23.

In *Rex* v. *Naylor* (1) the appellant had been cautioned in these words at the police court : " Do you wish to say anything " in answer to the charge ? You are not obliged to say any- " thing unless you desire to do so, but whatever you say will " be taken down in writing and may be given in evidence upon " your trial." In reply to that caution the appellant said : " I do not wish to say anything except that I am innocent." The recorder, in his summing-up, said : " Imagine a purely " innocent man accused of housebreaking and having these " words put to him—' Do you wish to say anything in answer " ' to the charge ? ' Surely, if he is innocent, one would think " he would give some explanation of where he was and what he " was doing at the particular time, and would make his defence " then and there . . . . Of course, what lurks in the back- " ground of this sort of hanging back and not disclosing his " defence is that he gives the prosecution and the police no " time to inquire into any statement he may make, so that it " might be possible to show that these statements are not true." Lord Hewart C.J., said " When one looks at the words of the " caution in s. 12, sub-s. 2, of the Criminal Justice Act, 1925, " which must be taken to have been framed deliberately, it is " obvious that they were intended to convey to the prisoner " the information that he is not obliged to say anything unless " he desires to do so. We do not think that the words of the " caution can properly be construed in the sense that the " prisoner remains silent after being cautioned at his peril " and may find his silence made a strong point against him at " his trial. In our view, the words mean what they say, and a " prisoner is entitled to reply to the caution that he does not " wish to say anything." Lastly, in *Rex* v. *Littleboy* (2) Lord " Hewart C.J., made these observations : " The real point urged " on behalf of the appellant is that the judge was wrong in " making observations upon the fact that the defence of alibi " had not been disclosed before the magistrates, and our " attention has been directed to *Rex* v. *Naylor* (1). It is " important to observe that in that case the fact that the " appellant had not disclosed his defence at an earlier date " was employed as being evidence against him in corroboration " of an alleged accomplice, who had given evidence for the " prosecution. It is important to remember that the judgment " in that case was given with reference to those facts. It is " quite true that there are sentences to be found in the report

(1) [1933] 1 K. B. 685.

(2) 24 Cr. App. R. 192, 196.

"of that judgment which appear to be of universal application. "We do not think, however, that it was ever intended to lay "down the proposition that a judge may not in a proper case "comment on the fact that the defence has not been disclosed "on an earlier occasion. It is one thing to make an "observation with regard to the force of an alibi, and to say "that it is unfortunate that the defence was not set up at an "earlier date so as to afford the opportunity of its being tested; "it is another thing to employ that non-disclosure as evidence "against an accused person and as corroborating the evidence "of an accomplice."

Having considered those cases, and, in particular, the clear and emphatic language used in *Rex* v. *Naylor* (1), I turn to the question whether or not the passages which I have read from the summing-up of Singleton J. in the present case amount to a misdirection justifying the quashing of the conviction. On three occasions the judge seems to suggest to the jury that they might infer the appellant's guilt by considering the fact of his silence after being cautioned. In our view, that amounted to a misdirection, and it is proper ground on which this conviction should be quashed. If it were not so, a caution might obviously be a trap instead of the means for finding out the truth in the interests of justice. An innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned, and, if that could be held out to a jury as ground on which they might find him guilty, he might obviously be in great peril. However that may be, the law seems to us to have been clearly laid down by this court on more than one occasion, particularly in *Rex* v. *Naylor* (1).

Though the proviso to s. 4, sub-s. 1 of the Criminal Appeal Act, 1907, applies to cases of murder, just as much as to any other criminal charge as appears from the speech of Viscount Sankey L.C., in *Woolmington* v. *Director of Public Prosecutions* (2), the court are unable to apply that proviso in the present case since we are unable to say that the jury, if properly directed, would inevitably have found a verdict of guilty. Accordingly the appeal must be allowed, and the conviction quashed.

Conviction quashed.

Solicitors for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

C. G. M.

(1) [1933] 1 K. B. 685.

(2) [1935] A. C. 462, 482.

ATHEL LINE, LIMITED *v.* LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION, LIMITED.

1943
Nov. 11, 12, 15, 22.

Insurance (Marine)—General average—Vessel in convoy—Danger from enemy ships—Return to port under Admiralty instructions—Expenses of return—York-Antwerp Rules, 1924, *r. A.*

Two vessels belonging to the plaintiffs sailing in convoy from Bermuda to the United Kingdom, under escort and subject to the order of the commodore of the convoy, were insured by the defendants against the consequences of hostilities or warlike operations by or against the King's enemies, "general average ". . . . payable according to York-Antwerp Rules, 1924." When this convoy was two days out from Bermuda another convoy, ahead and also homeward bound, was attacked by an enemy raider and their escort vessel and others sunk. Thereupon, the Admiralty sent orders to the commodore of the convoy which included the plaintiffs' vessels that the convoy should return to Bermuda. The commodore ordered the masters in his convoy to put about immediately and the masters directed their course to Bermuda, pending the completion of new naval dispositions necessitated by the presence of the raider. The plaintiffs' vessels lost six days on their voyage, extra fuel and stores were consumed, additional wages were paid, and the cost of maintaining masters, officers and crews was incurred, together with the expense of entering and leaving Bermuda. The plaintiffs claimed ship's contribution of these expenses in general average under r. A of the York-Antwerp Rules, 1924, that is, as extraordinary expenditure, intentionally and reasonably incurred for the common safety for the purpose of preserving from peril property involved in a common maritime adventure :—

Held, that the language of r. A was inappropriate to describe the blind and unreasoning obedience of a subordinate to the lawful orders of a superior authority, and, therefore, the plaintiffs could not rely on the acts of their masters in returning to Bermuda, those acts being performed under the order of the commodore of the convoy ; nor, assuming that the act of a stranger could give rise to a claim for general average contribution, could they rely on (*a*) the act of the commodore, since, in giving the order to return to Bermuda, he himself was acting under orders given by the Admiralty, or (*b*) the act of the Admiralty, since on the agreed facts, the proper inference was that this order was given as part of the general strategic disposition of naval and merchant shipping in the North Atlantic.

ACTION in Commercial List tried by Tucker J.

By two policies of marine insurance, subscribed by the defendants, the motor vessels, *Athelbeach* and *Athelqueen*, owned by the plaintiffs, were covered for ninety-one days from August 23 to November 22, 1940, inter alia, "against the "consequences of hostilities or warlike operations by or "against the King's enemies; general average and salvage to "be payable according to York-Antwerp Rules, 1924, if so "claimed."

In November, 1940, the *Athelbeach* and the *Athelqueen* were proceeding on a voyage from the West Indies to the United Kingdom, each vessel being laden with a full and valuable cargo of molasses. At this time Great Britain was at war with the Axis Powers who were attempting by air and "U" boat warfare and by commerce raiders to sink and destroy as opportunity offered every British merchant vessel and her cargo and thereby to cut off essential supplies to the United Kingdom. In the interest of the efficient prosecution of the war and with a view to securing the maximum safety of sea borne commerce the British Admiralty under powers conferred by the Defence (General) Regulations, 1939, had assumed complete control over the movements of all merchant ships, this control being executed (inter alia) by means of routing and sailing instructions or through the orders of naval commodores in command of convoys. In the case of vessels actually under convoy the masters were, in particular, at all times under a legal duty to carry out the orders of such commodores. On November 3, 1940, the *Athelbeach* and the *Athelqueen*, in the course of their voyage, left Bermuda in convoy with other vessels under the escort and protection of H.M.S. *Montclare*, and at the time of the events next referred to the whole convoy and escorts were proceeding northwards to a position in the Atlantic Ocean where it was expected that the *Athelbeach* and *Athelqueen* and certain other vessels of the convoy would join another convoy bound for the United Kingdom from Halifax. While so proceeding, the merchant vessels of the convoy were subject to the authority and orders of the commodore of the convoy. On November 5, 1940, a British convoy, homeward bound, from Halifax to the United Kingdom and immediately preceding that in which the *Athelbeach* and the *Athelqueen* were to proceed, was attacked in a position of about 52 degrees 30 N., 32 degrees W, by a heavily armoured and powerful German warship. The escort of this convoy included H.M.A.C. *Jervis Bay*. This vessel engaged the enemy, but was sunk after an engagement lasting fifteen minutes. Thereafter a number of the ships in the convoy of the *Jervis Bay* were sunk or set on fire or disabled. Among others the *Rangitiki* and the *Cornish City* were sunk and the tanker *San Demetrio* was set on fire and disabled. Owing to the knowledge that an enemy raider was operating in the North Atlantic, the Admiralty at 00.53 on November 6 made an immediate signal to the senior officer of H.M.S. *Montclare* as follows :—" Convoy B.H.X.86 is to return to " Bermuda." In consequence of this order the *Athelbeach* and the *Athelqueen*, in common with the other ships in their convoy, received from their commodore an order to put about immediately. At the time when these orders were given the position of the raider was estimated by the Admiralty at approximately 1,350 miles from the position of the convoy which was about 38.26 N., 57.55 W., or 472 miles from Bermuda. The masters of the *Athelbeach* and the *Athelqueen* at once obeyed the orders, and in compliance therewith the vessels were put about and by 2.30 a.m. on November 6, 1940, they were around and headed back to Bermuda with their escort whither they proceeded pending the completion of the new naval dispositions necessitated by the presence of the new raider. They anchored at Bermuda at 2.17 p.m. on November 8, 1940. The two vessels were detained by naval orders at Bermuda until November 10, 1940, when they each received fresh sailing orders to proceed to Halifax on independent passage in accordance with routing instructions from the N.C.S.O. Bermuda and they left accordingly and forthwith proceeded with their original cargoes. Each vessel was detained at the port of Bermuda from November 8 to 10, 1940, her voyage was prolonged by six days from November 7 to 12, 1940, and extra fuel and stores were consumed and expenditure incurred in entering and leaving Bermuda and during the detention of the vessel there and the prolongation of their voyages in respect of additional wages and maintenance of their masters, officers and crews. The plaintiffs claimed that this expenditure and/or the cost of the additional fuel and stores consumed and the wages of the masters, officers and crews and the expenses of entering and leaving Bermuda were all allowable as general average according to the York-Antwerp Rules, 1924, and that the proportion of each ship of such general average was recoverable under the appropriate policy subscribed by the defendants as having been incurred to avoid, or in connexion with the avoidance of, a peril insured against, viz., the consequences of hostilities or warlike operations by or against the King's enemies. The defendants denied all liability, but it was agreed that, if the plaintiffs were entitled to recover as general average at all, then the ships' proportions thereof and the sums due under the policies were: *Athelbeach*, 332*l*. 4*s*. 9*d*.; *Athelqueen*, 365*l*. 13*s*. 9*d*. It was common ground that by virtue of the provisions of the Naval Discipline Act, 1866, and of Navigation Order No. 1, of 1939 (St. R. & O., 1939, No. 1157), made in pursuance of powers conferred on the Lords Commissioners of the Admiralty by reg. 43 of the Defence (General) Regulations, 1939, which in turn derived authority from the Emergency Powers (Defence) Act, 1939, the masters of these ships were at all material times bound by law to obey any navigation order issued by the naval officer in charge of the convoy.

A. J. Hodgson for the plaintiffs. There was here a general average act within the meaning of r. A of the York-Antwerp Rules, 1924 (1). The expenditure was (a) extraordinary, (b) incurred for the common safety to preserve the property involved in the adventure, (c) from a peril insured against, and (d) the act resulting in the expenditure was both "intentional" and "reasonable." A deviation to avoid capture is a general average act at common law. In Rudolf's York-Antwerp Rules at p. 77 it is stated: "Where the "necessity of putting into a port of refuge arises from some "'extraordinary circumstances' other than a definite accident

(1) By Marine Insurance Act, 1906, s. 66, provides: "(1.) A "general average loss is a loss "caused by or directly consequential on a general average "act. It includes a general "average expenditure as well as "a general average sacrifice. "(2.) There is a general average "act where any extraordinary "sacrifice or expenditure is voluntarily and reasonably made or "incurred in time of peril for the "purpose of preserving the "property imperilled in the common adventure. (3.) Where "there is a general average loss, "the party on whom it falls is "entitled, subject to the conditions imposed by maritime "law, to a rateable contribution "from the other parties interested, "and such contribution is called "a general average contribution."

By the York-Antwerp Rules, 1924, r. A:—"There is a general "average act when, and only "when, any extraordinary sacrifice or expenditure is intentionally and reasonably made "or incurred for the common "safety for the purpose of preserving from peril the property "involved in a common maritime "adventure." By r. C: "Only "such damages, losses or expenses "which are the direct consequence "of the general average act "shall be allowed as general "average . . . ."

" or sacrifice, the inward and outward port charges are allow-" able under r. Xa, as general average. This expression has " been regarded as covering a case . . . . where to avoid " capture the vessel has run into a port of refuge." The court will draw the inference from the facts that there was great danger from the German raider and that the return to Bermuda was for the common safety of the ships and cargoes in this convoy. As to the drawing of inferences by the court, see the observations of Roche J., in *Compania Maritima of Barcelona* v. *Wishart* (1), approved by Bankes L.J., in *Zachariessen* v. *Importers and Exporters Marine Insurance Co., Ld.* (2). The perils insured against were the consequences of hostilities or warlike operations by or against the King's enemies. If the peril is real, it is sufficient, although not immediate: see judgment of Roche J., *Vlassapoulos* v. *British and Foreign Marine Insurance Co.* (3). Whether or not there is any difference between the adverbs " voluntarily " in s. 66, sub-s. 2, of the Marine Insurance Act, 1906, and " intentionally " in r. A, the expenditure here was " in-" tentionally " incurred within the meaning of r. A. The fact that it was incurred in compliance with a lawful order does not negative an intention to return to Bermuda and the expenditure was " reasonably " incurred since, if it were not reasonable, the Admiralty would not have ordered the convoy to return to the port of loading, when the cargoes were urgently needed in this country. A general average act need not be the act of the master of the vessel. In *Papayanni and Jeromia* v. *Grampian Steamship Co., Ld.* (4) a ship which had put into a port of refuge because she was on fire was scuttled by order of the master of the port and it was held that the scuttling was a general average act : see also *Price* v. *Noble* (5), and the observations of Rowlatt J., in *Joseph Watson and Son, Ld.* v. *Fireman's Fund Insurance Co. of San Francisco* (6). To limit the act of expenditure for general average contribution to one by the master of the vessel is to read into the Marine Insurance Act, 1906, and the York-Antwerp Rules, 1924, words which are not there. [The speech of Lord Shaw in *Britain Steamship Co.* v. *the King* (7), Carver on Carriage by Sea (8th ed.) at pp. 575–6 and Lowndes on General Average (6th ed. at p. 50 were also cited.]

(1) (1918) 23 Com. Cas. 264, 270.
(2) (1924) 29 Com. Cas. 202, 205.
(3) [1929] 1 K. B. 187, 199.
(4) (1896) 1 Com. Cas. 448.
(5) (1811) 4 Taunt. 123.
(6) [1922] 2 K. B. 355, 358.
(7) [1921] 1 A. C. 99, 123–4.

Sellers K.C., and *Devlin* for the defendants. The plaintiffs have not discharged the onus on them of showing that the sums claimed were extraordinary expenditure incurred as the result of a general average act. The masters of the plaintiffs' ships were only performing their legal duty in carrying out Admiralty orders, which they were bound to obey: see s. 31 of the Naval Discipline Act, 1866, reg. 43 (1.) of the Defence (General) Regulations, 1939, and *The Vernon City* (1). The acts of the masters of the plaintiffs' vessels in putting about and following the commodore's directions which resulted in a return to Bermuda were, therefore, neither "voluntary" nor "intentional," and so they were outside the principles of general average and the ambit of r. A. There was nothing to show that the masters knew anything of the enemy raider, they exercised no discretion in the matter, and there was no deliberate choice on their part. They were merely directed on a course. The principle underlying general average is either an implied contract between ship-owner and cargo-owner or implied authority in the master to act as an agent of necessity: see the observations of Bailhache, J., in *Austin Friars Steamship Co. Ld.* v. *Spillers and Bakers, Ld.* (2) *and Ralli* v. *Troup* (3) The person to decide whether to make the extraordinary expenditure is not specified in r. A, but he must be the person in charge of the common maritime adventure, namely, the master of the vessel. "The act should be that of the master "or person in command" (4): see *Ralli* v. *Troup* (3). *Papayanni and Jeromia* v. *Grampian Steamship Co., Ld.* (5) is the only case where it might be said that the act of a stranger to the adventure has been held to be a general average act. *Ralli* v. *Troup* (3) was there cited to the court, and some text-books appear to take the view that Mathew J., in *Papayanni's* case (5) brushed aside the reasoning in *Ralli* v. *Troup* (3): see Lowndes on General Average, 6th ed., art. 6a, p. 50; Maclachlan on Merchant Shipping, 7th ed., p. 561 and foot-notes; Carver on Carriage by Sea, 8th ed., ss. 374 and 374a, p. 544; and Arnould on Marine Insurance, 12th ed., vol. II, s. 909, p. 1225. But this is not so. Mathew J. said there was clear evidence that the master of the ship sanctioned what was done. In *Price* v. *Noble* (6) the ship's stores were thrown overboard for the ship's safety with the approbation of the mate after the ship had been captured and was still in the hands of the enemy. Both *Papayanni's* case (1) and *Price's* case (2) are consistent with and in line with *Ralli* v. *Troup* (3). If it is suggested that the commodore of the convoy acted as the agent of the plaintiffs, he acted under orders, as did the two masters, and derived his authority from s. 31 of the Naval Discipline Act, 1866, and reg. 43 (1.) of the Defence (General) Regulations, 1939: see the observations of Lord Shaw in his dissenting judgment in *Britain Steamship Co.* v. *The King* (4). As to the Admiralty, who had no interest in the common adventure of the plaintiffs within r.A, their order was actuated by the general strategical position and could have no particular reference to the safety of the plaintiffs' ships. It is clear that it is not enough to bring the case within r. Xa unless it has been established that it is within r. A. The expenditure was not "extraordinary," but a kind which occurs every day in time of war. [*Svensden* v. *Wallace* (5), *Société Nouvelle d'Armement* v. *Spillers and Bakers, Ld.* (6), *Taylor* v. *Curtis* (7), Arnould on Marine Insurance (12th ed.), s. 915 was also cited.]

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(1) [1942] P. 9, 61.

(2) [1915] 1 K. B. 833, 837.

(3) (1894) 157 U. S. 386, 403.

(4) Phillips on the Law of Insurance, Vol. II, art. 1280, at p. 70.

(5) 1 Com. Cas. 448.

(6) 4 Taunt. 123.

Hodgson replied.

Cur. adv. vult.

Nov. 22. TUCKER J., read the following judgment. It was decided in *Vlassopoulos* v. *British and Foreign Marine Insurance Co.* (8), that in construing the York-Antwerp Rules, 1924, the lettered rules enunciate the general principles and the numbered rules settle how the general principles are to be applied in what might otherwise be doubtful cases, and, if the case is clearly outside the lettered rules, then the numbered rules have no application. In considering whether the case comes within the general principles enunciated in r. A it is necessary, in my view, to give effect to the whole of the language, carefully chosen as it no doubt was, by experts with knowledge of the long history of the law and practice of general average. The sacrifice or expenditure must be extraordinary, it must be made or incurred intentionally, and made or incurred reasonably for the common safety for the specific purpose referred to, namely, preserving from peril

(1) 1 Com. Cas. 448.
(2) 4 Taunt. 123.
(3) (1894) 157 U. S. 386, 403.
(4) [1921] 1 A. C. 123–4.
(5) (1884) 13 Q. B. D. 69.
(6) [1917] 1 K. B. 865.
(7) (1815) 4 Camp. 337.
(8) [1929] 1 K. B. 187.

1943

ATHEL LINE, LD. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSN., LD.

Tucker J.

the property involved in a common maritime adventure. If any of this language is inapplicable to the facts of a particular case then that case is not one involving a general average act. The rule, I think, clearly envisages the exercise by someone of his reasoning powers and discretion applied to a particular problem with freedom of choice to decide to act in one out of two or more possible ways, and the language is quite inappropriate to describe the blind and unreasoning obedience of a subordinate to the lawful orders of a superior authority.

Applying this test to the acts of the masters, I find that at 00.53 hours on November 6, 1940, they received from the commodore of the convoy orders to put about immediately, and that, as a result of further signals, they took a course which eventually brought them back to Bermuda. When they received the order to put about immediately they had no knowledge of the reason or reasons for the order, they did not know that it necessarily meant returning to a port of refuge, they had no means of assessing the degree of the risk, were unaware of the presence or position of the enemy raider, and merely carried out their duty of obeying the signal without applying their minds to what might have been a most difficult problem to decide had they been aware of the material facts. I am, accordingly, of opinion that, if the act relied on as giving rise to the incurring of extraordinary expenditure is the act of the master in each case in taking the course which ultimately resulted in the vessels returning to Bermuda, such act does not bring the case within r. A.

It is, however, said that, if the acts of the masters cannot be relied on, none the less the act of the commodore who gave the order which the masters had to obey will suffice and that this naval officer must be regarded as temporarily and for this purpose superseding the masters in command of their ships. Putting on one side for further reference the question whether the act of a stranger can give rise to a claim for general average contribution and assuming that it can, or that in the circumstances described the commodore is not to be considered as a "stranger," this argument requires further consideration of the facts. What were the circumstances known to the commodore and what was the problem presented to him for decision when he did the act relied upon ? The facts show that he in his turn merely obeyed a signal received from the Admiralty and passed on to the masters of the ships in convoy the necessary signals to comply with the orders he had received. He knew that the order was to return to Bermuda, and that, unless cancelled, this would involve return to the port of loading, but, apart from this, there is nothing to show that he had any more information than the masters, or that he ever applied his mind to the solution of the difficult problem which must always confront someone under r. A. I am, therefore, of opinion that the act of the commodore will not avail the plaintiffs. They seem to me to be driven to rely on the act of the Admiralty in issuing the order to the commodore. What is the proper inference to be drawn as to the reasons for the issue of this order beyond the facts stated in the agreed facts that it was owing to the knowledge that an enemy raider was operating in the North Atlantic and that the convoy proceeded to Bermuda "pending the "completion of the new naval dispositions necessitated by "the presence of the new raider"? The inference necessary to support the plaintiffs' claim is that it was reasonably given for the common safety to preserve from peril the M.V. *Athelbeach* and the M.V. *Athelqueen* and their cargoes involved in a common maritime adventure. The only inference that I feel I can safely and properly draw from the agreed facts is that the order was given as part of the general strategic disposition of the naval and merchant shipping at the disposal of the Admiralty so as to minimize as far as practicable the risks to be incurred by all shipping in the North Atlantic, including, no doubt, those ships which made up this particular convoy, and to enable the available combatant ships to be deployed against the enemy to the best advantage. It is impossible to speculate with regard to the various factors and calculations which may have been required to be taken into consideration or as to the further facts within the knowledge of the authorities. Nor is it possible to estimate whether the same steps would have been taken if the Admiralty had been concerned only with the avoidance of peril by M.V. *Athelbeach* and M.V. *Athelqueen*, or, perhaps, this particular convoy as a whole. For these reasons I am of opinion that this case is not within the provisions of r. A of the York-Antwerp Rules, 1924. I have considered the facts separately in so far as they affect the decisions taken by the masters, the commodore and the Admiralty. If this is not the correct approach, and the transaction should be viewed as a whole, it appears to me that the result is necessarily the same.

As I have formed a definite view on this aspect of the case, I think it undesirable that I should express any opinion with regard to the point which was much discussed in argument before me and as to which there is no clear authority, namely, whether the act giving rise to a general average claim must be the act of the master, or some other member of the crew in case of his incapacity or unavoidable absence, or whether the act may in exceptional circumstances be that of a stranger, and whether there is any difference between English law on this subject and American law as laid down by the majority of the Supreme Court in *Ralli* v. *Troup* (1), in which connexion the cases of *Price* v. *Noble* (2), and *Papayanni and Jeromia* v. *Grampian Steamship Co., Ld.* (3) were cited. Nor do I express any view whether the expenses incurred in this case were extraordinary expenditure within the meaning of r. X a, if and in so far as these questions involve considerations distinct from those necessary to my decision as already expressed. In the result, there must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendants: *Hill, Dickinson & Co.*

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(1) (1894) 157 U. S. 386.
(2) 4 Taunt. 123.
(3) 1 Com. Cas. 448.

C. G. M.

1943
Nov. 25.

CONQUEROR PROPERTY TRUST, LIMITED, *v.* BARNES CORPORATION.

Landlord and tenant—Rent restriction—Standard rent—Letting of dwelling-house purely for purpose of fixing standard rent—No intention to occupy or occupation in fact—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*a*).

A dwelling-house was let to a limited company, the admitted object of the letting being to fix a high standard rent. The company never intended to, and never did, occupy the flat:—

Held, that the letting was a sham made merely to establish a fictitious standard rent, and, therefore, was not a letting with reference to which a standard rent could be fixed under s. 12, sub-s. 1 (*a*), of the Increase of Rent & Mortgage Interest (Restrictions) Act, 1920.

1943

CONQUEROR PROPERTY TRUST, LD. *v.* BARNES CORPORATION.

CASE stated by Surrey quarter sessions.

At a court of summary jurisdiction sitting at Mortlake on December 8, 1942, an information was preferred by the respondents, Barnes Corporation, against the appellants, the Conqueror Property Trust, Ld. ("the landlords") for that they, being the landlords of a dwelling-house, 39, Sheen Court, Barnes, to which the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 3 of and sch. I to the Rent and Mortgage Interest Restrictions Act, 1939, applied, on a request in writing made by Mrs. Falla, the tenant of the dwelling-house, under s. 11 of the Act of 1920, to be supplied with a statement in writing as to the standard rent thereof, did, on October 22, 1942, supply the tenant with a statement in writing which was false in a material particular, in that it gave an incorrect figure of £250 as the standard rent.

It was proved or admitted that Sheen Court consisted of a block of flats, the rateable value of No. 39 being 34*l.* The block of flats was managed for the landlords by Knight & Co., Ld. The flat was first occupied on June 1, 1940, when it was let to a Mr. Walton at a rent of 78*l.* per annum. He left on July 24, 1941, and the flat was then let to the tenant on a monthly tenancy at the same rent. On April 29, 1942, notice was served on her terminating her tenancy, and an offer was made to grant a new monthly tenancy at 96*l.* per annum. A rent book was issued to her by Knight & Co., Ld., but no entry was made in the space therein provided for the amount of the standard rent until April 29, 1942. On October 22, 1942, the statement, the subject-matter of the charge, was made by the landlords. By an agreement under seal dated December 9, 1939, the landlords let the flat to Knight & Co., Ld., for one month from December 1, 1939, at a rent at the rate of 250*l.* a year, payable in advance. The landlords entered into that agreement purely to establish a standard rent. Knight & Co., Ld., never intended to, and never did, occupy the flat and they gained nothing by the transaction. Rent in respect of the flat was included in a cheque for 1323*l.* 6*s.* 8*d.* paid by Knight & Co., Ld., to the landlords on May 23, 1940. The directors of the two companies were the same, and to some extent the companies had the same shareholders, and they had the same registered office. The justices convicted the landlords. Quarter sessions affirmed the conviction, stating that the agreements were entered into to create a fictitious standard rent and were not bona fide lettings within the contemplation of s. 12, sub.-s. 1 (*a*), of the Act of 1920.

Wallington K.C. and *Valentine Holmes* for the landlords. The case finds that the flat was in fact let and the rent paid. The motive for the letting is immaterial, and, indeed, there is no evidence that the letting was in bad faith. If the landlords had gone into liquidation there would have been no answer to the liquidator's claim for rent against Knight & Co. The standard rent, therefore, is the rent stipulated in the agreement of December 9, 1939, even though in particular circumstances it is not the economic rent. For example, if a father lets a house worth 150*l.* a year to his son on marriage for 50*l.* a year, that may be the standard rent: per Mackinnon L.J. in *Davies* v. *Warwick* (1). The same principle must apply if the rent fixed be higher than the economic rent [*Carter* v. *S.U. Carburetter Co.* (2) and *Chamberlain* v. *Farr* (3) were also referred to].

Simes for the corporation. By s. 12, sub.-s. 1 (*a*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1930, the standard rent is "the rent at which the dwelling-house was let." That means that the subject-matter of the letting must be a dwelling-house which is occupied as such, and the whole tenor of s. 3 of the Rent and Mortgage Interest Restrictions Act, 1939, shows this also. The letting which produces the rent must be bona fide. This flat was not so let. Knight & Co., Ld., never intended to, and never did, occupy it. They were to pay rent in advance, but no rent was paid until May 23, 1940, in other words, the rent was not enforced. The whole transaction was merely colourable, and was entered into in furtherance of the common interest of the two companies.

Wallington K.C. replied.

The judgment of the court (Viscount Caldecote C.J., Macnaghten and Tucker JJ.) was delivered by

MACNAGHTEN J., who stated the facts and continued: The question for our decision is whether the agreement which was

(1) [1943] K. B. 329, 333.
(2) [1942] 2 K. B. 288, 291.
(3) [1942] 2 All E. R. 567.

made on December 9, 1939, when Knight & Co., Ld., had no intention of ever occupying the flat, was an agreement to let a dwelling-house within the meaning of the Rent Restrictions Acts. Mr. Wallington has insisted that the agreement is, on the face of it, a perfectly valid and effective agreement to take the flat and pay the rent. A document, however, may be executed with no intention that it should be acted on, but merely for the purposes of show. The case for the corporation was that this agreement was a sham and a pretence, and therefore was not a letting within the meaning of the Rent Restrictions Acts. The latter was the view taken by the petty sessional court and by the court of quarter sessions, and, in our view, that opinion is quite correct. Indeed, it is difficult to see how those courts could have come to any other conclusion. The letting referred to in the Rent Restrictions Acts obviously means a real letting by a landlord who really intends to let to a tenant who really intends to take. It does not include a document executed merely to establish a standard rent. All the facts of the case point to the conclusion that that was the sole object of this agreement. It is difficult to imagine any tenant entering into a transaction from which he derived no benefit and taking a flat of which he had no intention of making any use. In those circumstances quarter sessions came to a correct conclusion and the conviction of the landlords must be upheld.

Appeal dismissed.

Solicitors for landlords: *Stikeman & Co.*
Solicitor for corporation: *Town Clerk, Barnes.*

W. L. L. B.

MARSH *v.* COMMISSIONER OF POLICE AND ANOTHER.

1943
Nov. 25

Innkeeper—Lien—Claim to ring deposited by guest as security for bill.

A guest at an inn, asked to pay his bill, said he was unable to do so, but he handed to the innkeeper as security for payment of the debt a ring:—

Held, that the innkeeper's lien did not attach to the ring, and the innkeeper had merely received it as a pledge.

CASE STATED by Feltham justices.

At a court of summary jurisdiction sitting at Feltham, Middlesex, the appellant, Charles Owen Marsh, on behalf of the Goldsmiths and Silversmiths Co., Ld., applied under s. 1 of the Police (Property) Act, 1897, that the Commissioner of Police should deliver to him a woman's diamond and sapphire ring, and the respondent, Alfred Francis McGee, on behalf of the Ritz Hotel (London), Ld., applied that the Commissioner should deliver the ring to him. The ring was in the hands of the commissioner as having been an exhibit in criminal proceedings.

The hotel was an inn within the Innkeepers Act, 1878. On November 24, 1942, one George Eric Nall was received as a guest at the hotel, where he stayed until November 29, and during this period he incurred a bill for 66*l.* 6*s.* 11*d.* On or about November 25, 1942, Nall obtained from the jewellers the ring in question, of the larceny of which he was convicted on January 12, 1943. On November 28, 1942, Nall was asked by the hotel to pay his bill. He stated that he was unable to do so, but he produced the ring and handed it to the hotel as security for payment of the bill. No suggestion was made that the hotel knew the circumstances in which the ring had come into Nall's possession. The justices held that the hotel, as innkeepers, had a lien on the ring, and were entitled to an order in their favour. The appellant appealed.

Beecroft for the appellant. The magistrates were wrong. An innkeeper's lien can only extend to goods taken in as a guest's luggage: *Robins* v. *Gray* (1); the obligation to take in those goods being the foundation of the right at common law. Here the ring was not guest's luggage. It was not contained in any luggage so as to be part of it. The hotel proprietors never saw the ring until payment of the bill was discussed. It was then received by them as a pledge, and a thief can give to a pledgee no better title to the article stolen, as against the true owner, than he has himself: *Cheesman* v. *Exall* (2). It was held in *Broadwood* v. *Granara* (3) that a piano was not guest's luggage, and reliance was placed on the fact that the innkeeper knew that the piano belonged to a third party, it having been sent in to the guest on hire after he had arrived at the hotel. In the present case, the ring was a lady's ring, and the fact that

(1) [1895] 2 Q. B. 501.
(2) (1851) 6 Ex. 341.
(3) (1854) 10 Exch. 417.

it was handed over by a man should have put the hotel proprietors on inquiry. [*Matsuda* v. *Waldorf Hotel* (1) was also referred to.]

Horace Fenton for the respondent, McGee. An innkeeper's lien extends to all kinds of property belonging to the guest which comes into the innkeeper's possession, no matter in what circumstances the innkeeper obtains possession: *Threfall* v. *Borwick* (2); for instance, if the property has been deposited with him for safe custody, as this ring can be said to have been. In *Angus* v. *McLachlan* (3) it was held that an innkeeper who accepted goods as security for payment of his bill did not waive his lien, the goods (a letter charging a bill of sale of shares in a ship) having been given to the innkeeper after the debt was incurred and after demand for payment: [*Mulliner* v. *Florence* (4) was also referred to].

VISCOUNT CALDECOTE C.J. The law as to an innkeeper's lien is not in doubt. An innkeeper is given a lien on the luggage of the guest which the guest brings with him to the inn and which the innkeeper receives as such. I do not think that there is any distinction between "personal luggage" and "luggage" so far as the lien is concerned. It might be that what the guest brings with him is a motor-car and the lien would extend to that. A case has been cited to us in which a piano was brought by the guest. That certainly is not "personal "luggage," but there is no suggestion that a piano might not be the subject of an innkeeper's lien. The innkeeper is given this right or privilege by the common law, and it is limited, in my judgment, to articles which the innkeeper receives and on which he can put and keep his hand.

On the facts of the present case it is, I think, clear that the hotel proprietors did not exercise an innkeeper's lien on this ring for the simple reason that they were never in a position to do so until the time came when the guest, owing a bill which he was unable to pay, produced and handed the ring to the innkeeper as security for the payment of the debt. Mr. Beecroft, for the jewellers, relied on the point that this was not an article on which an innkeeper's lien could be exercised. I think that is wrong, and if this had been part of the property which the innkeeper received—whether it was separated from

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(1) (1910) 27 T. L. R. 153.
(2) (1875) L. R. 10 Q. B. 210.
(3) (1883) 23 Ch. D. 330.
(4) (1878) 3 Q. B. D. 484.

1943

MARSH v. COMMISSIONER OF POLICE.

Viscount Caldecote C. J.

the rest of the property or whether it was kept with the rest of the property, does not seem to me to matter—I think he might have exercised his lien on it, but I base my judgment on the view which I take that the ring had never been received as part of the guest's luggage and therefore the hotel proprietors were never in a position to exercise a lien. If a man pledges property belonging to another person to somebody, even to an innkeeper, that other person cannot retain it as against the real owner of the property. That seems to be supported by what Pollock C.B. said in *Cheesman* v. *Exall* (1): " If a person pledges with another property to which he has no " title, and which he has no right to pledge, the real owner " may interpose, and get possession of the property." In my view, the opinion at which the justices arrived was wrong in point of law, and the appeal must be allowed.

MACNAGHTEN, J. I agree.

TUCKER J. I agree.

Solicitors for appellant: *McKenna & Co.*
Solicitor for respondent: *Leslie J. Griffin.*

W. L. L. B.

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(1) 6 Exch. 341, 343.

1943
Nov. 30.

EVANS *v.* THE BRITISH DOUGHNUT COMPANY, LIMITED.

Merchandise marks—" Trade description "—" Contains dried egg " (foreign). Contents equivalent in use to twelve eggs "—Merchandise Marks Act, 1887 (50 *&* 51 *Vict., c.* 28), *s.* 2, *sub-s.* 1 (*d*) *; s.* 3, *sub-s.* 1.

A company printed on a packet containing goods a pictorial representation of twelve eggs and the following words:— " Eggstead. Contains dried egg (foreign). Contents equivalent " in use to twelve eggs." The company was summoned on an information for unlawfully applying a false trade description to the goods, contrary to s. 2, sub-s. 1, of the Merchandise Marks Act, 1887, inasmuch as they were described on the packet as being equivalent in use to twelve eggs. The justices dismissed the information on the ground that the wording on the packet, forming the subject of the charge, was not a " trade description" within the meaning of s. 3, sub-s. 1, of the Act of 1837:—

Held, that not only the words laid in the information, namely, " Contents equivalent in use to twelve eggs," but all the words

1943

EVANS
v.
BRITISH
DOUGHNUT
CO., LD.

on the packet, namely, "Contains dried egg (foreign). Contents "equivalent in use to twelve eggs," had to be considered, and that those words contained an indication as to the material of which the goods were composed within s. 3, sub-s. 1 (*d*), of the Act, and were, therefore, a "trade description" within that sub-section.

CASE STATED by Montgomery justices.

At a court of summary jurisdiction, sitting at Llansantffraid an information was preferred by the appellant, Evan Walter Evans, an inspector under the Merchandise Marks Acts for the county of Montgomery, against the respondents, the British Doughnut Company, Ld., trading as Marsh and Andrews, for that they on October 29, 1941, at the parish of Llandysilio in the said county, did unlawfully apply a false trade description to goods, to wit, a packet of "Eggstead," contrary to s. 2, sub-s. 1, of the Merchandise Marks Act, 1887. Upon the application of the appellant, the court granted leave to amend this charge to read that the respondents on the said date at the said parish did unlawfully apply a false trade description to goods, to wit, a packet of "Eggstead," inasmuch as it is described on the packet as being equivalent in use to twelve eggs.

The appellant was the agent of the Montgomery county council, properly authorized to institute the proceedings. On October 29, 1941, the appellant purchased at G. and G. Jeffreys' Stores, Four Crosses, in the parish of Llandysilio, for the sum of 1*s*. 6*d*. a quantity of "Eggstead." This was contained in a packet, which was enclosed in an outer packet, on one face of which was printed a pictorial representation of twelve eggs and the following wording :—"Marsh and Andrews, Dorset "House, N.W.1. Eggstead. Contains dried egg (foreign). "Contents equivalent in use to twelve eggs. Manufactured "and packed in England, 1*s*. 6*d*." On another face appeared the words "Eggstead. Contains dried egg (foreign). Contents "equivalent in use to twelve eggs. Instructions for all baking "purposes, use two heaped dessert-spoons of 'Eggstead' to "eight table-spoons of warm water—Add this mixture to one "shell egg and use as four eggs. Sole distributors Armour and "Company Ld., Thornton House, Finsbury Square, E.C.2., "1*s*. 6*d*." The appellant removed the outer packet and placed the inner packet with its contents in a sealed glass jar, which he sent, with its contents, to the public analyst for the county of Montgomery, who made an analysis of the contents of the packet and found that they contained 32 grammes of protein

1943

Evans v. British Doughnut Co., Ld.

and 16 grammes of oil, this being the equivalent in protein and oil content to one and a-half shell eggs. The packet contained 10 per cent. dried egg. Seventy-five per cent. of twelve eggs should contain 39 grammes of protein and 43 grammes of oil. The justices were of opinion that the wording on the packet of "Eggstead" forming the subject of the charge was not a "trade description" within the meaning of s. 3, sub-s. 1, of the Merchandise Marks Act, 1887 (1), and they dismissed the information. The appellant appealed.

Norman Parkes for the appellant. The decision of the justices was wrong. The false description laid in the information as amended, was that a packet of "Eggstead" was described on the packet as being equivalent in use to twelve eggs. That was an indication, direct or indirect, as to the material of which the goods were composed within the meaning of s. 3, sub-s. 1 (*d*), of the Merchandise Marks Act, 1887. What was indicated by the words: "Contents equivalent in "use to twelve eggs" was: "Here are a number of in-"gredients or materials and among them some which are "equivalent in use to twelve eggs."

Havers K.C. and *C. E. Rochford* for the respondents. The words on the packet: "Contains dried egg (foreign)," were not before the justices, since they were not in the information. Had they been included, it could not have been contended that they did not constitute a "trade description" within the meaning of s. 3, sub-s. 1, of the Merchandise Marks Act, 1887. The only words in the information relied on as a description of "Eggstead" were: "equivalent in use to twelve "eggs," and those words were not an indication as to the

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(1) By Merchandise Marks Act, 1887, s. 3; sub.-s. 1: "For the "purposes of this Act . . . The "expression 'trade description' "means any description, state-"ment, or other indication, direct, "or indirect, (*a*) as to the num-"ber, quantity, measure, guage, "or weight of any goods, or (*b*) as "to the place or country in which "any goods were made or pro-"duced, or (*c*) as to the mode of "manufacturing or producing any "goods, or (*d*) as to the material "of which any goods are com-"posed, or (*e*) as to any goods "being the subject of an existing "patent, privilege, or copy-"right . . . ."

"The expression 'false trade "'description' means a trade "description which is false in a "material respect as regards the "goods to which it is ap-"plied . . . ."

1943

Evans v. British Doughnut Co., Ld.

material of which "Eggstead" was composed within the meaning of para. (*d*) of the sub-section. The description in the words contained in the information is one of quality or value, and the sub-section does not in any clause deal with quality or value. It refers only to the constituents, ingredients or materials of goods: *Holmes* v. *Pipers, Ld.* (1). No doubt, the appellant could have proceeded under s. 6, sub-s. 1, of the Food and Drugs Act, 1938, which deals with a person giving with any food or drug sold by him a label calculated to mislead as to its nature, substance or quality, but he did not do so.

Parkes replied.

Viscount Caldecote C.J. The information charged the respondents that they "did unlawfully apply a false trade "description to goods, to wit, a packet of 'Eggstead' inasmuch "as it is described on the packet as being equivalent in use to "twelve eggs," contrary to s. 2, sub-s. 1, of the Merchandise Marks Act, 1887, but in my opinion, in considering whether there was here a "trade description" within s. 3, sub-s. 1, of the Merchandise Marks Act, 1887, all the words on the packet have to be considered. These are: "Contains dried "egg (foreign). Contents equivalent in use to twelve eggs." If the totality of those words is considered it is impossible to say that they are not "an indication, direct or indirect ". . . . as to the material of which" the goods were composed, because there is in the plainest terms a description that the goods contained "dried egg (foreign)." Counsel for the respondents submitted that the words in the information were only a statement as to the value of the goods, and that no words referring to value or quality are to be found in the definition of a trade description or of a false trade description in this sub-section, and, by contrast, he referred us to s. 6, sub-s. 1, of the Food and Drugs Act, 1938, which provides that a person who gives with any food or drug sold by him a label which falsely describes that food or drug, or is otherwise calculated to mislead as to its nature, substance or quality, may be guilty of an offence. For the reason I have given, however, I think that the justices were wrong on a matter of construction in holding that there was not here a "trade "description" within the meaning of the sub-section. The

(1) [1914] 1 K. B. 57.

1943

EVANS v. BRITISH DOUGHNUT CO., LD.

appeal will be allowed, and the case must go back to the justices, with an intimation of our opinion, that they may consider whether the "trade description" was false in a material respect.

ATKINSON J. I agree. In my opinion, the court cannot ignore the context in determining whether the precise words complained of in the information, "equivalent in use to "twelve eggs," come within the definition of "trade "description" in s. 3, sub-s. 1, of the Merchandise Marks Act, 1887. It is plain that these words, read with the context, are an indication as to the material of which "Eggstead" is composed within the meaning of the sub-section.

Appeal allowed.

Solicitors for appellant: *Gregory, Rowcliffe & Co., for G. R. D. Harrison, Welshpool.*

Solicitors for respondents: *Durrant Cooper & Hambling.*

C. G. M.

1943

Nov. 24.

SUMMERS *v.* ROBERTS.

Medicine—Sale—"Shop"—Stall in uncovered part of market—Shops Act, 1912 (2 *Geo.* 5, *c.* 3), *s.* 19, *sub-s.* 1*—Pharmacy and Medicines Act,* 1941 (4 & 5 *Geo.* 6, *c.* 42), *s.* 17, *sub-s.* 1.

By s. 17, sub-s. 1, of the Pharmacy and Medicines Act, 1941, a "shop" in the Act is defined as having the same meaning as in the Shops Act, 1912. By s. 19, sub-s. 1, of that Act:—"The "expression 'shop' includes any premises where any retail trade "or business is carried on."

The appellant sold by retail liniment in bottles, recommended as a medicine, in the uncovered portion of a city market, at a stall consisting of a board resting on, but not fixed to, two trestles. He occupied the stall regularly on Tuesdays and Saturdays only, paying 10*s.* each day, for approximately the same site, allotted to him by the corporation:—

Held, that the sale was not made at a "shop" within the meaning of that word in the Pharmacy and Medicines Act, 1941. In construing the word "shop" it must be interpreted from its setting and context in that Act and the word "premises" in the definition connoted a permanent place, defined by precise limits, on which, or on part of which, there was some sort of structure where a regular retail business could be carried on.

CASE STATED by the Leeds stipendiary magistrate.

At a court of summary jurisdiction, sitting at Leeds an information was preferred by the respondent on behalf of the Pharmaceutical Society of Great Britain against the appellant for that he on July 25, 1942, in the city of Leeds, did sell by retail at a stall, situated outside the Leeds City Markets, an article consisting of a substance recommended as a medicine, namely, " Eaz-u-Quick Oil," the sale not having been effected at a shop, contrary to s. 12, sub-s. 2, of the Pharmacy and Medicines Act, 1941. The facts, which were not in dispute, were that on July 25, 1942, the respondent, an inspector duly appointed by the Pharmaceutical Society, visited the uncovered portion of the Leeds City Markets, which are under the control of the Leeds City Corporation. The appellant was selling a liniment, which he described as " Eaz-u-Quick Oil " in bottles, at prices from 1s. 6*d*. to 5s. 6*d*. The bottles were labelled duly with the prescription formula and were sold under a proprietary designation. The inspector purchased a bottle for 2s. 6*d*. and informed the appellant that the sale thereof was in contravention of the Pharmacy and Medicines Act, 1941, as not being a sale from a shop. The bottles contained a substance recommended as a medicine within the meaning of that Act. It was harmless and there was no evidence as to whether, or not, it was effective. The appellant had for some time regularly and continuously occupied the site on Tuesdays and Saturdays, paying 10*s*. for it on each day. The site was originally allotted to him—he had no right of selection—and approximately the same site was allotted to him each day; this was by custom and not under any express contract with the corporation. If the occupier of a site happened not to be able to attend on any day, he had a right, by payment of half-toll, to have the site kept for him on the next occasion that he presented himself; this also was by custom and not under any express contract with the corporation. If he did not come, the site would be given to some other applicant on that day. To effect his sales, the appellant hired each day, with the permission of the corporation, two trestles and a board for which he paid 1*s*. 6*d*. to a private individual. These he placed on the site, the board with no covering over it being supported by the two trestles, but not fixed in any way to them. On the board were placed the bottles. The appellant made his mixture on the spot and the place from which the appellant sold was nothing else than a board resting on two trestles, which were removed on each occasion.

The magistrate was of opinion that the sale did not take place from a " shop " or " premises " within the meaning of the Shops Act, 1912, and did not, therefore, take place from a shop within the definition of " shop " in s. 17, sub-s. 1, of the Pharmacy and Medicines Act, 1941, and therefore found the charge proved, dismissing the information under the Probation of Offenders Act, 1907, and ordering the appellant to pay 10*s*. costs, but he stated this case.

Havers K.C. and *McLusky* for the appellant: This stall consisting of a board and trestles occupied regularly in the uncovered section of the Leeds City Market, for which a substantial rent was paid to the Leeds corporation, was a " shop " within the meaning of the definition of a shop in the Pharmacy and Medicines Act, 1941, which is taken from the Shops Act, 1912. It may be that the object of the provision was to secure that substances recommended as medicines, within the meaning of s. 12, sub-s. 5, of the Act of 1941, should not be hawked around by itinerant vendors, but should be sold at a fixed place where the vendor could be found. The appellant sold this liniment at a fixed place where he could be found and he was a stall-holder selling there, with the permission and approval of the corporation. The words " any premises " must include any place with anything upon it and the sole test is whether at that place any retail trade or business is carried on. See *Dennis* v. *Hutchinson* (1); *Wallace* v. *Dixon* (2); *Inland Revenue* v. *Caplan* (3). The decision, therefore, of the magistrate was wrong and the appellant should have been acquitted.

Holroyd Pearce for the respondent. It is clear that a " shop " within the definition of that word in the Shops Act, 1912, means something other than a place, since in s. 9 of the Shops Act, 1912, the two words are contrasted :—" in any place " not being a shop." From the language used in the Shops Act, 1912, it would seem that the premises where any retail trade or business is carried on must have some sort of

(1) [1922] 1 K. B. 693, 697, 698.

(2) [1917] 2 I. R. 236, 247.

(3) 1930 S. C. 507, 512.

structure, sited within precise limits, in a permanent place. The premises must be such as can be "closed for the serving "of customers." See s. 4, sub-s. 1. This definition when applied to the Pharmacy and Medicines Act, 1941, must be interpreted from its context in that Act, having regard to the scope and object of the Act, which is to raise the status of the business of pharmacy. *Pope* v. *Whalley* (1). No doubt, a retail business was being carried on at this stall on two days a week, but it is impossible to describe this board on two trestles as "premises." This word is to be found in many sections of the Act of 1941, and in all of them with the meaning of some structure or building in a permanent place which is capable of supervision. By s. 1, sub-s. 1 (*g*), certain premises must be registered. It was part of the appellant's defence to establish that he sold this substance recommended as a medicine at a "shop," and that means at a recognized place of selling, which can always be found and not one which is here to-day and gone to-morrow.

Havers K.C. replied.

VISCOUNT CALDECOTE C.J. In my opinion, we must construe the word "shop," as if the language defining that word in s. 19, sub-s. 1, of the Shops Act, 1912, had been reproduced and reprinted in s. 17, sub-s. 1, of the Pharmacy Act, 1941. Blackburn J., in *Pope* v. *Whalley* (1), approached the question of the meaning of the word "shop" in s. 13 of the Markets and Fairs Clauses Act, 1847, in that way. He said (2): "The question is, what is meant by the expression "'shop' in this section? Looking at the object of the Act, "it was to introduce such clauses as would now be proper to be "put into the grants in local statutes relating to markets. "What did the legislature intend with reference to such an "object?" The word "shop," therefore, as defined, has to be interpreted in the setting and context in which it is to be found in the Pharmacy and Medicines Act, 1941. That Act clearly provides machinery by which the status of this trade or profession may be maintained or raised. There are provisions in the sections of the Act which, as may be seen at a glance, seem to suggest that the "premises" or "shop" referred to should be a permanent place defined by precise limits on which or on part of which there should be some sort of

(1) (1865) 6 B. & S. 303. (2) Ibid. 310.

structure where a regular retail business can be carried on. For instance, every authorized seller of poisons is to cause all the sets of premises where his business, so far as it comprises the retail sale of drugs, is being carried on, to be registered. See s. 12 of the Pharmacy and Poisons Act, 1933, and ss. 1 and 2 of the Pharmacy and Medicines Act, 1941.

The argument addressed to us on behalf of the appellant was that the word "shop" has a natural meaning, but that the interpretation clause in s. 17, sub-s. 1, has given it an "extended and unnatural meaning," as was said by Pim J., in *Wallace* v. *Dixon* (1), of the same definition in the Shops Act, 1912, and it was contended that the only test is to see whether or not at the place in question a retail trade or business is being carried on. But I think it is also necessary to consider whether there are any "premises," in the proper significance of that word, where the retail trade or business is carried on. Looking at the objects and scope of the Act and the obvious intention of the legislature, as disclosed by its provisions, to deal with defined premises with a structure on them, I think that this definition must be read as including in addition to that which is a "shop" in the natural meaning of that word a permanent place, with limits which can be defined precisely, on which or on part of which there is some sort of structure, where a regular retail trade can be carried on.

So far, I have dealt with the case as one of construction of this definition in the Pharmacy and Medicines Act, 1941. I do not think that cases interpreting "shop" in other statutes are of much assistance to the court. But this definition in the Shops Act, 1912, was considered in *Dennis* v. *Hutchinson* (2). The question there before the court was whether a place—to use a neutral word—where games of mixed chance and skill were carried on, was one where a retail trade or business was being carried on and this question was, on clear grounds, answered in the negative. In the judgments in that case are to be found dicta of Lord Trevethin C.J., and of Avory J., which, at first sight, seem to give some support to the argument for the appellant. Lord Trevethin C.J., said (3): "Prima facie a shop is a "place where goods are sold by retail and stored for sale; it is "not a place where something in the nature of gambling takes "place." Avory J., said (4): "It seems to be quite clear that "the ordinary dictionary meaning of 'shop' is a place where

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(1) [1917] 2 I. R. 236, 247.

(2) [1922] 1 K. B. 693.

(3) Ibid. 697.

(4) Ibid. 698.

"ordinary retail selling and the serving of customers takes "place." But I do not think that either judge in that case was intending to deal with the question we are now considering or with any other question than the difference between a place used by the public for games of mixed chance and skill and one used for retail buying and selling. For this reason these dicta do not affect the view which I have formed of the meaning of the word "shop" in the Pharmacy and Medicines Act, 1941.

The case of *Inland Revenue* v. *Caplan* (1) was also cited to us, In that case, the court were considering the exceptions from an "industrial hereditament" contained in s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, one of which is a hereditament occupied and used as a factory or workshop, primarily occupied for the purposes of a retail shop. Lord Hunter (2) said in a dissenting judgment after referring to the definition of a "shop" in the Shops Act, 1912: "In "*Wallace* v. *Dixon* (3) it was held that a coal merchant's "office, in which orders were taken for the sale of coal by "retail, although no coal was kept on the premises, constituted "a shop within the meaning of that Act. It was pointed out "by the judges who took part in that decision that to constitute a shop it was not necessary that there should be "a building in which articles were stored or exposed for sale. "All that was necessary was that there should be a place—it "might be an open yard—where retail business was carried on. "I see no reason to think that the word 'shop' was used in "any more restricted sense in the Rating Act of 1928 than it "was in the Shops Act of 1912." With the greatest possible respect to Lord Hunter, I doubt whether he intended to give a complete definition of the word "shop." It might be one which I should respectfully adopt if the only question was the meaning of the word "shop," but I do not think it is a satisfactory interpretation of that word in the Pharmacy and Medicines Act, 1941.

In *Wallace* v. *Dixon* (3) the court decided that a coal merchant's branch office where no coal was kept and where orders only were taken was a "shop" and an attendant who took the orders was a "shop-assistant" within the meaning of s. 19, sub-s. 1, of the Shops Act, 1912. Pim J.,

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(1) 1930 S. C. 507.

(2) Ibid. 512.

(3) [1917] 2 I. R. 236, 247.

1943

SUMMERS v. ROBERTS.

Viscount Caldecote C.J.

said (1), what indeed seems to be obvious, "that the "legislature meant to give an extended and unnatural meaning "to the word 'shop,' a meaning that went far beyond the "popular and recognized meaning of the word." Accepting that statement, as I do, as accurate, I do not find that the words used in the definition, as it is in the Pharmacy and Medicines Act, 1941, namely: "premises where any "retail trade or business is carried on" are so wide as to require the court to find that a place or site in no way limited or bounded by any ascertainable marks or fences, with no structure upon it except an uncovered board resting upon two trestles, used for retail sale with no continuity or regularity except twice a week, on Tuesdays and Saturdays, is a "shop" for the purposes of the Pharmacy and Medicines Act, 1941. The decision, therefore, of the magistrate was right.

MACNAGHTEN J. I agree.

TUCKER J. I agree.

Appeal dismissed.

Solicitors for the appellant: *Corbin, Greener & Cook,* for *Neal (Arthur), Scorah & Co., Sheffield.*

Solicitors for the respondent: *Thompson, Quarrell & Co.*

(1) [1917] 2 I. R. 236, 247.

C. G. M.

C. A.

1943

Nov. 11, 12; *Dec.* 1.

TEDMAN *v.* WHICKER.

Landlord and tenant—Rent restriction—Standard rent—Progressive rent—Rent fixed in agreement—Reduced rent payable during hostilities—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*a*).

A dwelling-house was let for one year and afterwards quarterly, subject to three months' notice on either side, under an agreement which provided for payment of a rent of 150*l.* per annum, "except "as hereinafter provided." It was then provided that "during "the period of hostilities" the rent should be 112*l.* On an application under s. 11 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to determine the standard rent:—

Held, on construction, that the substance of the agreement being to pay a rent of 112*l.*, which was to be increased to 150*l.* on the happening of a specified event and not to pay a rent of 150*l.* to stand reduced to 112*l.* until a certain event happened, the dwelling-house was let at a progressive rent payable under the tenancy agreement within the meaning of the proviso to s. 12, sub-s. 1 (*a*), of the Act of 1920, and that, therefore, the standard rent of the dwelling-house was 150*l.*

Appeal from Kingston-upon-Thames county court.

By an agreement, dated July 1, 1942, the landlord " first let " the premises No. 8, The Brambles, Woodside, Wimbledon, to the tenant. The letting was " for a term of one year from " July 1, 1942, and afterwards quarterly subject to 3 months' " notice on either side at an inclusive yearly rental of 150*l.* " (except as hereinafter provided) clear of all deductions except " landlord's property tax," payable at stated times. The tenant agreed " to pay the rent at all times in manner aforesaid " without any deductions." He also agreed to keep the garden assigned to the premises in a neat and tidy condition. The agreement, by. cl. 4, continued : " The landlord hereby agrees " with the tenant as follows : (1.) that in view of the impossi- " bility of obtaining the necessary labour and materials during " hostilities to reinstate the garden to accept a reduction of " 38*l.* for the period of hostilities only, the rent to revert to the " reserved figure immediately and without notice after the " cessation of hostilities." On an application by the tenant to the county court, under s. 11 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to determine the standard rent of the premises, the county court judge found that it was 150*l.* The tenant appealed.

Denning K.C. and *Merlin* for the tenant. This was not a " progressive rent payable under a tenancy agreement " within the meaning of the proviso to s. 12, sub-s. 1 (*a*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended by s. 3, sub-s. 1, and sch. I to the Rent and Mortgage Interest Restrictions Act, 1939 (1) ; see per Scrutton L.J., in *Goldsmith* v. *Orr* (2) ; *Pond* v. *Barber* (3). The proviso contemplates a rent which automatically increases

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 1 (*a*), after defining " standard rent," continues : " Provided that, " in the case of any dwelling- " house let at a progressive rent " payable under a tenancy agree- " ment or lease, the maximum " rent payable under such tenancy " agreement or lease shall be the " standard rent. . . ."

(2) (1920) 123 L. T. 614, 616.

(3) (1923) Estates Gazette, Jan. 9, 1923.

C. A.
1943
Tedman
v.
Whicker

during the continuance of the tenancy: per Lord Wright in *Wheeler* v. *Wirral Estates, Ld.* (1). Here the only term provided for was for fifteen months. It could not be predicted that the rent would increase during that term, and in fact it did not. To fall within the proviso the period of increase must be fixed at the time of, and by the terms of, the letting, and not with reference to an unascertained period as in the present case. [*Bryanston Property Co.* v. *Edwards* (2) was referred to.] The standard rent in the present case was 112*l.*, and the 150*l.* was merely a springing interest: *Queen's Club Gardens Estates, Ld.* v. *Bignell* (3). "Payable" in the proviso means "which in fact has become payable in events which "have happened," and that is not the case here, or "necessarily "becoming payable under, and during the term of, the lease "or agreement," which, likewise, is not the case here.

Pritt K.C. and *Stephen Murray*, for the landlord, were not called on to argue.

Cur. adv. vult.

Dec. 1. The judgment of the court (Scott L.J., Asquith and Uthwatt JJ.) was read by Uthwatt J., who stated the facts and continued: At the trial some stress was laid on the derelict condition of the garden, and it appears to have been argued on the part of the landlord that there was either an implied obligation on the landlord to reinstate the gardens after the end of hostilities or an implied obligation on the tenant to spend 38*l.* per annum on the gardens during the war, leading in either case, it was suggested, to the inference that the true rent throughout was 150*l.* Inasmuch as on the hearing of this appeal counsel for the landlord was not called on, the point has not been argued before us. We are content to deal with the case on the footing favourable to the tenant (and we think it the right footing) that there is no such implied obligation, and that there is merely stated a reason, not a very convincing reason, for requiring to be paid during the continuance of hostilities, a sum lower than that required to be paid after their termination.

The first question is whether on the construction of the tenancy agreement, considered apart from the provisions of the Rent Restriction Acts, the rent payable under the agreement during the continuance of hostilities is 150*l.* or 112*l.* (that is

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(1) [1935] 1 K. B. 294, 300.
(2) Ante p. 32.
(3) [1924] 1 K. B. 117.

C. A.

1943.

TEDMAN
v.
WHICKER.

150*l.* less 38*l.*). The rent reserved in the reddendum is " 150*l.* " except as hereinafter provided," and the exception can refer only to 150*l.* as reduced during the period of hostilities under cl. 4 (I.). The covenant to pay rent is not a covenant to pay 150*l.*, but to pay the rent generally, and that necessarily refers to the rent for the time being reserved by the reddendum. In cl. 3 the reference is to " rents " and not " rent." Cl. 4 (I.) is not throughout consistent in expression. The sum of 150*l.* is obviously the sum referred to as " the reserved figure," but the sum of 150*l.* as reduced is described as the rent which is to revert to the reserved figure. The word " revert " is an inaccurate word, but the outstanding point is that the reduced sum is there treated as rent. As a matter of construction of the agreement the rent reserved by the agreement is, in our opinion, during the continuance of hostilities 112*l* and thereafter 150*l.*

That being the construction of the tenancy agreement, considered apart from the Act, the next question is whether, for the purposes of the definition of " standard rent," the rent at which the premises are let is still 112*l.* rising to 150*l.* or whether it is 150*l.* In our view it is 112*l.*, rising to 150*l.* As was observed by Lord Greene M.R. in *Bryanston Property Co., Ld.* v. *Edwards* (1), the Act contemplates the substance of the obligations of the tenant, or, as du Parcq L.J. put it in the same case (2), one ought not to be too technical in construing the Act. In this case the substance of the agreement is, in our opinion, an agreement to pay a rent which is to be increased on the happening of a specified event, and not a rent of 150*l.* to stand reduced to 112*l.* until a certain event happens. The rent of 150*l.* is a reality as well as the rent of £112, for it will be observed that the tenant might well find himself under a present liability to pay the increased rent without the opportunity of determining his tenancy before the increased rent became payable. No technicality is involved in treating the rent for the purposes of the Act as one which increases from 112*l.* to 150*l.*

We would add that we are not suggesting that for an increased rent to be taken into account for the purposes of the Act it must be one the active incidence of which it is not open to the tenant to avoid by determining his tenancy. That point is not before us. It is only for the purpose of emphasizing what is involved in the substance of the transaction that we

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(1) Ante p. 32.

(2) Ante p. 41.

C. A.
1943

TEDMAN
v.
WHICKER.

observe on the chance of the tenant under the present tenancy agreement having to pay the increased rent willy nilly.

One other matter may be referred to on this part of the case. The tenancy agreement states a reason for the reservation of a lower rent until a particular point of time. It is not necessary to consider the value of the reason, for, assuming the transaction embodied in a tenancy agreement to be a reality, the rent may be made to vary for good reason, bad reason, or no reason at all.

The remaining question is whether these premises were let at a progressive rent payable under the tenancy agreement. Upon this point we have the advantage of the views expressed by the Master of the Rolls in *Bryanston Property Co., Ld.* v. *Edwards* (1). We agree with the views expressed by him, and that agreement renders it unnecessary to deal at any length with much of the elaborate argument presented to us by Mr. Denning. It was not contended, and it could not with any prospect of success be contended, that the rent was not a progressive rent. Any such contention to succeed must be based on the view that a progressive rent involves more than one step. The phrase " progressive rent " is not a term of art and the implication of more than one step is rejected both by the ordinary meaning of language and by authority of *Wheeler* v. *Wirral Estates, Ld.* (2), and *Bryanston's case* (1), to which we have already referred. The substantive point taken is that, accepting the position that the rent is a progressive rent, the progressive rent is not a progressive rent payable under a tenancy agreement. It was argued that the word " payable " should be read as meaning " in fact has become payable in events which " have happened " or that the words " payable under a lease " or tenancy agreement " should be read as meaning " neces- " sarily becoming payable under, and during the term of, the " lease or tenancy agreement." In our opinion, the proviso is not patient of either construction. The short answer to this contention is that the reference both in the substantive part of the definition and in the proviso is to the terms of the letting. Events, having an effect on the amount of the rent, which have happened or which may happen do not come into the picture.

We are confirmed in our rejection of the first gloss by the fact that under s. 11 of the Act of 1920, the county court is given power on the application of the landlord or tenant to determine summarily any questions as to the amount of the standard

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(1) Ante p. 32.

(2) [1935] 1 K. B. 294.

C. A.

1943

TEDMAN
v.
WHICKER.

rent of any dwelling-house. Such an application may be made at any time and, if it be so made, the court, one would naturally assume, must then be in a position to deal with it. Now, there can be only one standard rent and acceptance of the first gloss would negative the court's power to deal conclusively with this application unless all events which might bear upon the maximum rent had been ascertained. That is an impossible position. This criticism of the first gloss does not apply to the second gloss, but the strain the second gloss places on the language of the section passes the breaking point and it may fitly be left at that.

Mr. Denning's argument on construction was largely concerned with the general policy of the Act and the manoeuvres on the part of landlords rendered possible by the construction of its provisions which he sought to displace. On this we observe only, that so far as the court, in construing the Act, is concerned at all with the policy, it is concerned with the policy embodied in it as gathered from its terms and with the means provided in the Act for giving effect to that policy. The policy of this Act, so far as the ascertainment of the standard rent of dwelling-houses first let after September 1, 1939, is concerned is to leave that standard rent to be determined by the terms of the first tenancy agreement. The generous landlord is, indeed, protected in that the standard rent is not to be less than the rateable value at the critical date. Subject to that, the terms of the first bargain fix the standard rent, whatever may be the circumstances of the landlord, the tenant, or the property. The landlord, concerned with the terms of the first letting, not only as fixing his immediate return but also as fixing the standard rent, in determining his course of action in relation to the first tenancy, is entitled to have one eye on the Act while having his other eye on the paper embodying the tenancy terms. The Act is addressed to him. Why should he wander in the dark when a lamp is ready to hand? The argument for the tenant in the ultimate analysis amounted only to this, that bargaining between the landlord and the tenant on the occasion of the first letting, when the landlord had the terms of the Act in mind and could order his course accordingly, might very well result in a rent which ought not to be regarded as the standard rent. Whether that be so or not it is not for us to express an opinion, but, assuming it to be so, the result suggested is a criticism on the policy of the Act and not an argument on its construction. The county

C. A.
1943
TEDMAN
v.
WHICKER.

court was, in our opinion, right in holding that the standard rent of these premises is 150*l*. The appeal is dismissed, with costs.

Appeal dismissed.

Solicitors for tenant: *Oswald Hanson & Smith.*
Solicitor for landlord: *S. Seifert & Co.*

W. L. L. B.

C. C. A.
1943
Dec. 8.

REX *v.* WOODWARD.

Criminal law—Trial—Poor prisoner—Legal aid—Counsel assigned for defence—Right of prisoner to conduct his own defence.

A person charged with a criminal offence has the right to claim at the commencement of his trial to conduct his own defence, notwithstanding that he has applied for legal aid and counsel has been assigned to him under the Poor Prisoners Defence Act.

APPEAL from a conviction at Birmingham city sessions of receiving stolen goods.

The appellant, Ernest Isaac Woodward, was charged with larceny and receiving. He applied for legal aid and counsel was assigned to conduct his defence under the Poor Prisoners Defence Act. At the last moment the counsel who had been assigned to him returned his brief, which was then handed to another counsel who intimated his readiness to proceed with the case. The appellant, however, said that he would rather not have legal aid, and that he would prefer to conduct his own defence. He added that it was not fair to him to proceed with his trial without his having had an opportunity of seeing his counsel. The assistant recorder then said: " You have been granted legal aid and counsel has " been assigned to you, and you are now in the hands of " counsel." The appellant then said that he ought to be allowed to conduct his own defence. Several times during the course of the trial he tried to make some observation or to ask a question of a witness, but he was told by the assistant recorder that he was in the hands of his counsel, and that he would be well advised to leave those matters to his counsel's discretion. Later, on the question of sentence, the appellant made some observation as to the want of certain evidence, whereupon the assistant recorder said:

"I must preserve order. You are represented by counsel." The appellant was convicted of receiving, and now appealed against his conviction.

Edie for the appellant. The conviction ought to be quashed as the appellant was compelled to have a counsel to defend him against his will and was not allowed to conduct his own defence. Further, there was misdirection on the part of the assistant recorder in his summing-up to the jury as he confused the two charges of stealing and receiving, and did not point out the difference between the evidence necessary to prove the two offences.

Gamgee for the prosecution. When a prisoner asks for legal aid and a counsel has been assigned for his defence, it is not open to the prisoner to repudiate his counsel and to claim the right to conduct his own defence. In *Reg.* v. *Maybury* (1), Cockburn, C.J., said that "when a case is fairly before the "court and counsel is seized of it, his authority cannot be "revoked." There was no misdirection in the present case.

The judgment of the court (Viscount Caldecote C.J., Atkinson and Tucker J.J.) was delivered by

VISCOUNT CALDECOTE C.J. In our opinion, no person charged with a criminal offence can have counsel forced upon him against his will. Of course, if counsel has examined witnesses, still more if he has addressed the jury for the defence, the prisoner cannot say that he wishes to take over his own defence and to put questions to witnesses who have already been examined, or to supplement the remarks which his counsel has already made by observations of his own. Nothing of that sort, however, took place in this case. At the beginning of the trial the appellant said that he wished to defend himself, on the quite intelligible ground that he had not had an opportunity of seeing the counsel who was going to defend him, and he was refused what we think was his right to make his own defence to the jury instead of having it made for him by counsel.

We have been referred to *Reg.* v. *Maybury* (1) in which something was said by Cockburn C.J. as to the necessity for clients to decide either to conduct their case in person or to place themselves in the hands of counsel. I find it difficult to

(1) (1865) 11 L. T. 566.

derive much assistance from that observation, which was made with reference to the facts of that case, because it appears that counsel there decided to withdraw from the case, he was allowed to do so, and the client then addressed the court on his own behalf. We think that the refusal of the assistant recorder to allow the appellant to conduct his own defence was wrong and that it resulted in an injustice to the prisoner.

In these circumstances, although there was a good deal of evidence against the appellant, we think that it is impossible that the conviction should stand,

Conviction quashed.

Solicitor for appellant : *Registrar of Court of Criminal Appeal.*
Solicitor for prosecution : *Beale & Co.*

R. F. S.

1943
Nov. 9.

HOCKING v. AHLQUIST BROTHERS, LIMITED.

Evidence—Chattel—Nature or condition—Need to produce chattel in court.

Emergency legislation—Civilian clothing—Restrictions on manufacture—Non-compliance with the restrictions—Article of clothing not produced in court—Parol evidence as to condition of article—Making of Civilian Clothing (Restrictions) Order, 1942 (*St. R. & O.*, 1942, *No.* 541), *art.* 1, *sch.*

Production in court of chattels or physical objects is not legally requisite to render parol evidence as to their nature admissible.

Restrictions on the manufacture of civilian clothing with regard to the number of pockets in jackets, the number of buttons on waistcoats and the width of trousers were imposed by the Making of Civilian Clothing (Restrictions) Order, 1942. Proceedings having been instituted against manufacturers of civilian clothing for non-compliance with the restrictions, parol evidence was given by a witness that he had visited the manufacturer's premises and inspected a number of articles of civilian clothing which did not comply with the order, but the articles of clothing were not produced in court. The magistrate dismissed the information on the ground that the prosecution had not given the best evidence available regarding the condition of the articles of clothing as they had not been produced in court :—

Held, that the evidence of the witness who had seen the articles of clothing and spoke as to their condition was admissible and ought to have been considered by the magistrate, without the production of the articles in court.

1943

HOCKING
v.
AHLQUIST
BROS., LD.

CASE stated by the Manchester stipendiary magistrate.

Informations were preferred by the appellant, on behalf of the Board of Trade, against the respondents, Ahlquist Brothers, Ld., of Manchester, for that they, being a person carrying on the business of making the articles of civilian clothing specified in column 1 of the schedule to the Making of Civilian Clothing (Restrictions) Order, 1942, on or about February 17, 1943, in the course of making a blue striped jacket, failed to comply with the restrictive provisions specified in col. 2 of the schedule in that the jacket had more than three pockets, and also as to other garments, that they failed to comply with other restrictive provisions in the schedule with regard to waistcoat buttons and straps and the width of trousers.

At the hearing of the informations on June 23, 1943, an enforcement officer of the Board of Trade gave evidence that on February 17, 1943, he visited the respondents' premises and inspected a number of articles of civilian clothing made or in course of manufacture which failed to comply with the order. No notice to produce the articles in court had been given to the respondents. It was contended on their behalf that, as the garments had not been produced in court, the best available evidence regarding them had not been given. The magistrate was of opinion that the respondents' contention was right, and that the appellant had failed to discharge the onus of proof which was on him. He, accordingly, dismissed the information. The appellant appealed.

Valentine Holmes for the appellant. The stipendiary magistrate was wrong in holding that the prosecution had not given the best available evidence of the offence charged. It is true that secondary evidence cannot be given of the contents of a document which can be produced in court, but that rule does not apply to articles such as these. It is stated in Cockle's Cases on Statutes and Evidence, 6th ed., p. 408, as follows: "The third kind of evidence recognised by the "English law is that known as 'Real Evidence,' or the "evidence afforded by production of chattels or other physical "objects for inspection by the court . . . . The necessity "and reason for such evidence are indeed so obvious that there "are few cases dealing with the matter, and even text-books on "the law of evidence commonly neglect the subject. But, for "the sake of completeness, it appears proper to refer shortly to "the main features of such evidence . . . . One of the most

1943

HOCKING v. AHLQUIST BROS., LD.

" important points to be noticed is that . . . . production of " chattels or physical objects is not legally requisite in order to " render parol evidence as to their nature admissible. Even if " such production were easy, and manifestly the proper course, " non-production would only be matter of observation or " comment. This is so even although an important feature of " the object in question consists of writing or words so long as " it does not really amount to a ' document ' " ; see *Rex* v. *Hunt* (1). If there were such a rule of evidence as is suggested it would be necessary to produce the article in court, however large it might be before parol evidence could be given, and it would be impossible to produce very bulky objects such as a battleship.

Glidewell for the respondents. The magistrate was right. The rule that the best evidence must be given has been applied to other articles than documents : see *Chenie* v. *Watson* (2) ; *Boosey* v. *Davidson* (3). Production of the article in question is the best evidence and the court can require that evidence before parol evidence as to the nature of the article can be given. I am not contending for a general rule, but only for one in the circumstances of this case. Here the identity of the article could only be proved by its production. In cases of larceny the production of the stolen article is required.

VISCOUNT CALDECOTE C.J. I am of opinion that the stipendiary magistrate arrived at a wrong decision. We have had an interesting discussion on the history of the supposed rule that the best evidence must always be produced. It is not easy to see how the rule would work out in practice. Mr. Holmes said that, whether the article in question was a coat or a battleship, the best evidence of it would be its production, and I understand his argument to be that the relevance of the rule could not depend on the weight of the article.

The suggested rule is recent in the history of our law as compared with the rule of law regarding the proof of documents which dates from a much earlier time. Two cases have been cited to us as supporting the supposed rule, one decided in 1797 and the other in 1849. In *Boosey* v. *Davidson* (3), which was decided in 1849, there was a question of infringement of copyright, and it was assumed that a printed musical score was a document and therefore secondary evidence could not be

(1) (1820) 3 B. & Ald. 566.

(2) (1797) Peake Add. Cas. 123.

(3) (1849) 13 Q. B. 257.

given of its contents unless its non-production was accounted for. That is a long way from laying down a rule of law that in every case the object about which evidence is being given must be produced. In *Rex* v. *Hunt* (1), which was cited to us by Mr. Holmes, it was held that the banner of a riotous mob need not be produced in court, but that evidence could be given of the words on the banner. Hallett J. has referred me to two cases of more recent date, both of which seem to be very much in point. In *Lucas* v. *Williams & Sons* (2) damages were claimed for the infringement of copyright in a picture, and it was held that the evidence was admissible of a person who said that he had seen the original picture and that the photograph sold by the defendants was a copy of it. Lord Esher M.R. said (3): "Different kinds of evidence may be used to "prove the same fact, and this is another way of proving the "fact that the picture which the defendants sold is a copy of "the original picture in respect of which there is copyright. "If the jury were not satisfied, it would be open to them to "say, 'You could have produced better evidence; you have "'not produced the original picture; we will not act upon this "'evidence, though it is legal evidence,'" and then he and the other members of the Court of Appeal said that it was not necessary for the plaintiff to produce the original picture. *Boosey* v. *Davidson* (4) was cited in that case. In *Reg.* v. *Francis* (5): the charge was one of attempting to pass off a false ring. The person charged tried to obtain an advance from a pawnbroker by pretending that it was a diamond ring whereas it was not a diamond ring. Lord Coleridge C.J. said (6): "It was objected that the evidence of what took place at "Leicester was not properly received, because the cluster ring "which he there attempted to pass was not produced in court, "and that the evidence of two witnesses who saw it, and swore "to its being false, was not admissible. No doubt if there was "not admissible evidence that the ring was false it ought not "to have been left to the jury; but though the non-production "of the article may afford ground for observation more or less "weighty, according to circumstances, it only goes to the "weight, not to the admissibility, of the evidence, and no "question as to the weight of this evidence is now before us."

In my judgment, it is much too late, even if it was ever possible, to suppose that evidence of the nature of chattels cannot be given by witnesses who have seen them and speak to their condition. To suppose that all the articles about which issues are raised in a great variety of cases ought to be produced in court would lead to consequences which would show how impossible the suggested rule would be in practice. The decision of the magistrate was wrong. He should have considered the evidence which was tendered by the prosecution apart from the production of the articles of clothing themselves, the condition of which at the hearing of the information might have been quite different from their condition at the time when the enforcement officer saw them, which is the material time for the purpose of the charge. The appeal will be allowed and the case remitted to the magistrate to determine.

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(1) 3 B. & Ald. 566.
(2) [1892] 2 Q. B. 113.
(3) Ibid 116.
(4) 13 Q. B. 257.
(5) (1874) L. R. 2 C. C. R. 128.
(6) Ibid 132.

MACNAGHTEN J. I agree.

HALLETT J. I agree.

Case remitted.

Solicitor for appellant: *Solicitor to the Board of Trade.*

Solicitors for respondents: *Samuel Price & Sons, for Percy H. Barker, Manchester.*

R. F. S.

C. A.
1943
Nov. 4, 5, 22.

LARRINAGA STEAMSHIP COMPANY, LIMITED, *v.* REGEM.

Insurance (Marine)—War risks—Warlike operation—Outward voyage of ship with munitions—Return voyage in ballast—Stranding on return voyage—Obedience to orders of charterer's agent.

On the outbreak of war a steamship was requisitioned under the charterparty known as T. 99 A, incorporating Form T. 773. By cl. 9 of the charterparty: "The master shall prosecute his "voyages with the utmost despatch, and shall render all possible "assistance with ship's officers and crew and boats, cranes, derricks "and winches on board, and although appointed by the owners "he shall be under the orders and direction of the charterer as "regards employment, agency, or other arrangements: . . . ." By cl. 11 the charterer was to furnish the master with all requisite sailing directions. The incorporated Form T. 773 provided: "(1.) The risks of war which are taken by the charterer are:— "(a) Those risks which would be excluded from an ordinary

"English policy of marine insurance by the following, or similar, "but not more extensive clause :—' Warranted free of capture, "' seizure, arrest, restraint, or detainment and the consequences "' thereof or of any attempt thereat, also from the consequences "' of hostilities or warlike operations, whether there be a declaration of war or not, civil war, revolution, rebellion, insurrection "' or civil strife arising therefrom or piracy' ; (*b*) loss of or damage "to the ship hereby chartered caused by :—(i.) hostilities, warlike "operations . . . ."

The ship, having conveyed a cargo of munitions to a French port, was ordered by the charterer's agent to leave the port and return in ballast in convoy to an English port where she would be released from service. On the return voyage she anchored owing to bad weather, her cable parted, and she stranded, sustaining damage :—

Held, (i.) that the ship at the time of the stranding was not engaged in any warlike operation, nor was the stranding the consequence of a warlike operation ; (ii.) that the "employment" referred to in cl. 9 was "employment of persons" and not "employment of the ship," and that the order to sail was not an "order as to employment" within cl. 9 ; and, therefore, that the charterer was not liable for the damage.

Decision of Atkinson J. [1943] W. N. 53 affirmed on the first point, but reversed on the second point.

APPEAL from Atkinson J. (1)

By a time charterparty, dated September 3, 1939, in Form T. 99A, incorporating Form T. 773, and entered into between the suppliants, the owners of the steamship *Ramon de Larrinaga*, and the Minister of War Transport on behalf of His Majesty, it was provided that : "(1.) The owners agree to "let, and the charterer agrees to hire the ship for such period "as the charterer may require . . . to be employed in such "lawful trades, between good and safe ports or places as the "charterer or his agent shall direct. . . . (2.) The owners "shall provide and pay for all wages, provisions and all other "expenses in connection with the master, officers and crew . . . "for the insurance of the ship except as otherwise provided "in cl. 23 . . . for all services in connection with the navigation of the ship, and for the maintenance of the ship in a "thoroughly efficient state. . . . (3.) The charterer shall (in "addition to the hire payable hereunder) be liable for all "expenses reasonably incurred by the owners for the purpose "of complying with the directions of the charterer as to placing "the vessel at his disposal at the port of delivery. While the "ship is on pay, the charterer shall be liable for all fuel . . . for

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(1) [1943] W. N. 53.

"stevedoring, pilotage, port charges . . . and, where incurred "for charterer's business, for customary tug assistance, boating, "agencies and commissions. (6.) Subject to cl. 9, the cargo "or cargoes shall be laden stowed and discharged by charterer's "stevedores. . . (9.) The master shall prosecute his voyages "with the utmost despatch, and shall render all possible "assistance with ship's officers and crew and boats, cranes, "derricks and winches on board, and although appointed by "the owners he shall be under the orders and direction of the "charterer as regards employment, agency, or other arrangements: and the charterer agrees to indemnify the owners "for all consequences or liabilities that may arise from the "master or officers signing bills of lading or other documents "or complying with such orders, as well as from any irregularity consequent thereon in the ship's papers. The charterer "shall not be held responsible for loss or damage sustained by "the owners through the negligence of pilots, masters, officers, "or crews of tug-boats, stevedores, or other qualified persons "employed by the charterer in the loading, stowage or discharge of the cargo. Nothing in this charterparty shall relieve "owners from their responsibility for safe and proper stowage "of the cargo. (11.) The charterer or his representative shall "furnish the master from time to time with all requisite "instructions and sailing directions in writing." Clause 23 referred to "attached form T. 773, the provisions of which are "herewith incorporated." This attached form provided: "The risks of war which are taken by the charterer are those "risks which would be excluded from an ordinary English "policy of insurance by the following, or similar, but not more "extensive clause:—Warranted free of capture, seizure, "arrest, restraint or detainment . . . also from the consequences of hostilities or warlike operations . . . ."

On October 5, 1939, the vessel sailed from Newport, Mon., with a cargo of motor lorries for army transport and guns, and carried them to St. Nazaire, which was a base for army supplies. This cargo was discharged there by October 13. On the evening of that day the transport officer ordered the captain to leave the port in ballast, and make for Quiberon Bay, there to join a convoy bound for the Bristol Channel, where the vessel was to be surveyed and then be released from service under the charterparty. The vessel, accordingly, left St. Nazaire in ballast in charge of a pilot. The weather being bad, she anchored, her anchor dragged and its cable broke.

C. A.

1943

LARRINAGA STEAMSHIP CO., LD. *v.* REGEM.

She then went aground and was damaged. The owners claimed that by the terms of the charterparty the charterer had agreed to make good to them the loss and expenses occasioned to them by this stranding. That claim being disputed, the owners, on October 21, 1940, filed a petition of right to enforce it.

ATKINSON J. held that the warlike operation on which the vessel had been engaged was completed when she had finished discharging at St. Nazaire, and that the suppliants were not entitled to rely on cl. 23 and Form T. 773. He, however, gave judgment for the suppliants on an alternative claim based on the following words in cl. 9 of the charterparty: " The master " . . . . although appointed by the owners, shall be under the " orders and direction of the charterer as regards employment " . . . . or other arrangements; and the charterer agrees to " indemnify the owners from all consequences or liabilities " that may arise from the master or officers . . . complying " with such orders," holding that the order to leave St. Nazaire on October 13 was an order " as regards employment . . . or " other arrangements," and that the stranding was a consequence of the master obeying that order against his better judgment, a protest by him based on bad weather having been overruled by the charterer's agent. The charterer appealed.

Sir Donald Somervell A.-G. and *Devlin* for the charterer. Atkinson J. has rightly held the charterer not to be liable under the provisions in the charterparty which make the charterer liable for loss or damage to the ship resulting from hostilities or warlike operations. If a ship engaged on a warlike operation runs aground, that is a war risk, and the same is true when a ship not engaged on a warlike operation is run into by a ship which is engaged on such an operation. Here the ship, on leaving St. Nazaire after discharging her cargo, was no longer engaged on a warlike operation, and her running aground was an ordinary marine risk. The question on which Atkinson J. decided against the charterer was whether the charterer was liable for damage to the ship because the master sailed against his own wishes by direction of the transport officer. There are two grounds on which this decision ought to be reversed. First, the transport officer's direction did not amount to a charterer's order within the meaning of cl. 9 of the charterparty, which does not cover such a direction as is in question here. A direction as to navigation is not one as to " employment " within cl. 9. [They referred to *Lensen Shipping Co., Ld.* v. *Anglo-*

Soviet Shipping Co., Ld. (1) and *Portsmouth S.S. Co., Ld.* v. *Liverpool & Glasgow Salvage Association* (2).] In *Limerick Steamship Co., Ld.* v. *W. H. Stott and Co., Ld.* (3) a similar clause was held not to cover marine risks following the order of the charterers. To hold the contrary would be inconsistent with the whole tenor and meaning of the charterparty. Secondly, the running aground cannot be regarded as the consequence or result of the transport officer's direction.

Sellers K.C. and *Owen Bateson* for the suppliants. The facts establish liability on the charterers under both heads of claim : (i.) On the ground that the damage was incurred in the course of and as a consequence of a warlike operation, (2.) under the indemnity given by cl. 9 of the charterparty. We submit Atkinson J. was wrong in not finding liability under (1.) as well as under (2.). St. Nazaire was one of the ports on the West Coast of France used by the British Expeditionary Force for transporting its transport, guns, etc., to France. The organization of the port was controlled by the Navy and Army, whose officers allotted vessels to berths, directed all their movements in accordance with the requirements of the Expeditionary Force and arranged for discharge by military personnel. The organization of this port, the movements of vessels in and out and about the port was in essence as much part of a warlike operation as the more immediate disposition and movements of forces in contact with the enemy. This was not an ordinary commercial adventure. The master rightly regarded himself as assisting in a campaign. The order to the vessel to leave was an order given to meet military requirements. The delivery of the last vehicle over the ship's rail could not then and there terminate her warlike activities. The ship was turned out of the port as part of military exigencies and requirements. She had been specially constructed internally to carry this war equipment and she remained so reconstructed at all times. She was to go off charter and be reinstated structurally on her return to the Bristol Channel and this is the earliest period when she can be said to have ended her warlike operation. If that be so *Yorkshire Dale S.S. Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (4) establishes that this loss was a consequence of the warlike operation. With regard to cl. 9 we rely on the interpretation of comparable clauses by Greer L.J. in

(1) (1935) 40 Com. Cas. 320.
(2) (1929) 34 Ll. L. Rep. 459.
(3) [1921] 2 K. B. 613, 621.
(4) [1942] A. C. 691.

Lensen Shipping Co., Ld. v. *Anglo-Soviet Supply Co., Ld.*(1) and Roche J. in *Portsmouth S.S. Co., Ld.* v. *The Liverpool and Glasgow Salvage Association* (2), which both support Atkinson J.'s. construction. Whether the disaster occurred in consequence of the order of the charterer's agent is one of fact and Atkinson J.'s. finding was correct. (MACKINNON L.J.: I do not see where you are going to stop. If you are right and the charterer tells you to go to New York he has to indemnify you from everything that happens on the journey. It makes insurance against marine risk by the owners a farce.)

It is not necessary to construe cl. 9 as widely as that. It depends on whether the loss can properly be said to be a consequence of the order in any given case. Here the master was sent into a danger he would not have been compelled to confront without the express orders of the charterer or in an ordinary commercial voyage.

(Counsel referred also to *Limerick S.S. Co.* v. *Stott* (3), *J. Wharton (Shipping), Ld.* v. *Mortleman* (4), *Commonwealth Shipping Representatives* v. *Peninsular and Oriental Branch Service (The Geelong)* (5).

Sir Donald Somervell A.-G. replied.

Cur. adv. vult.

Nov. 22. MACKINNON L.J. Lord Greene M.R. has authorized me to say that he has read the judgment which I am about to read, and that he agrees with it. [After stating the facts his Lordship continued :] As the damage in question was sustained by the stranding of the vessel, which prima facie is obviously a loss by perils of the seas, the owners, if they are to base their claim on the provisions in Form T. 773, must establish that, if they had taken out a marine policy containing this f.c.s. clause, and if they had claimed this loss under it, the underwriters could have successfully pleaded that they were not liable, because the loss was a " consequence of hostilities or warlike operations." Though damage by stranding or by collision is prima facie a loss by perils of the seas there are many cases which show that marine underwriters might plead that it was " a consequence of warlike operations," of which cases the latest is *Yorkshire Dale S.S. Co., Ld.* v. *Minister*

(1) 40 Com. Cas. 320.
(2) 34 Ll. L. Rep. 459.
(3) [1921] 2 K. B. 613.
(4) [1941] 2 K. B. 283.
(5) [1923] A. C. 191.

C. A.

1943

LARRINAGA STEAMSHIP CO., LD. v. REGEM.

MacKinnon L.J.

of War Transport (*The Coxwold*) (1). Such a plea has to be based on the nature of the cargo being carried, and the ports between which it is being conveyed.

At the time of this disaster the vessel had no cargo on board and she was bound for Newport. If it had happened when she was on her way outwards to St. Nazaire carrying her cargo of warlike stores the marine underwriters could have said that she was engaged on a warlike operation, and, on the authority of *The Coxwold* (1) case that her stranding was a consequence of that warlike operation. Can they say the same when she has delivered her cargo and is proceeding back to Newport in ballast ? I think not. If precise authority be sought for that conclusion it is to be found in *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (2), in which it was held that the *Geelong* was not engaged in a warlike operation, though the *Bonvilston* was so engaged. *J. Wharton* (*Shipping*), *Ld.* v. *Mortleman* (3) is to the same effect, though that concerned a vessel proceeding in ballast to a port *before* she there started upon a warlike operation, while this is the case of a vessel proceeding in ballast to a port of discharge from the charterparty *after* she has completed a warlike operation. I am, therefore, of opinion that Atkinson J. was right in holding that the suppliants' claim based on cl. 23 and Form T. 773 failed, and that the suppliants' argument against that part of his judgment also fails.

The suppliants, however, succeeded before Atkinson J. in an alternative claim based on some words in cl. 9 of the charterparty. It is perhaps desirable to take note of some other parts of the charterparty as bearing on the effect of the words in cl. 9 that are so relied on.

By cl. 1 the vessel is to be employed between such ports as the charterer or his representative shall direct. By cl. 2, the owner is, in effect, to provide and pay for the insurance of the ship against marine risks. By cl. 3 the charterer is to pay for various expenses, including stevedoring, pilotage, and port charges, and it is added that the owner shall " arrange " and pay for these services and be reimbursed by the charterer. Clause 6 provides that, subject to cl. 9, cargoes are to be loaded and discharged by the charterer's stevedores. Clause 9 is as follows :—" The master shall prosecute his voyages with the " utmost despatch, and shall render all possible assistance with

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(1) [1942] A. C. 691.

(2) [1923] A. C. 191.

(3) [1941] 2 K. B. 283.

" ship's officers and crew and boats, cranes, derricks and winches " on board, and although appointed by the owners he shall be " under the orders and direction of the charterer as regards " employment, agency or other arrangements; and the " charterer hereby agrees to indemnify the owners for all consequences or liabilities that may arise from the master or " officers signing bills of lading or other documents or complying with such orders, as well as from any irregularity consequent thereon in the ship's papers. The charterer shall not " be held responsible for loss or damage sustained by the " owners through the negligence of pilots, masters, officers or " crews of tug-boats, stevedores or other qualified persons " employed by the charterer in the loading, stowage or discharge of the cargo. Nothing in this charterparty shall " relieve owners from their responsibility for safe and proper " stowage of the cargo." Clause II says that the charterer or his representative shall furnish the master from time to time with all requisite instructions and sailing directions in writing.

The argument for the suppliants is that when the captain left St. Nazaire on October 13 he did so under " the orders and " direction of the charterer as regards employment," and that " the charterer agrees to indemnify the owners for all consequences or liabilities that may arise from the master . . . " complying with such orders." It is because the argument rests on these words selected or abstracted from cl. 9 that I advisedly said that it was based on " some words in cl. 9." The gist of this argument is that the order to leave St. Nazaire was " as regards the employment of the ship."

The right of the charterer to direct when, how, and whither the ship shall be navigated by the captain is expressly provided in cl. I—" to be employed between such ports as the charterer " shall direct," and by cl. II: " The charterer shall furnish the " master with sailing directions." Reading together cl. 6 and the whole of cl. 9, it seems to me obvious that the word " employment " in the part of cl. 9 which speaks of " employment, agency, or other arrangements " cannot refer to " the " employment of the ship " pursuant to cl. I and cl. II. Manifestly, it refers to the " employment " of stevedores, agents, pilots, tug-owners, or other persons with whom, by direction of the charterer, the master is to make contracts or " arrangements." That is the more apparent from the second paragraph in cl. 9, which says that the charterer shall not be

C. A.

1943

LARRINAGA STEAMSHIP CO., LD. v. REGEM.

MacKinnon L.J.

responsible for loss or damage sustained by the owners through the negligence of various persons " employed " by the charterer. The persons in question are those for whose services the owner is to " arrange " pursuant to cl. 3. In short, " employment " in cl. 9 means " employment of persons," not " employment of " the ship." Reading the charterparty as a whole, I think it is manifest that if " employment " in cl. 9 be read as meaning " employment of the ship " pursuant to sailing directions given by the charterer, a great many of the elaborate provisions of the contract will be made futile and ridiculous. Every movement of the vessel during the chartered period is the result of such directions. Every damage of any kind sustained by her during such movements can be argued to be a " consequence " of " complying with such orders." The owners, on this reasoning, could claim to be indemnified from every such loss or damage, and if they have insured, as is contemplated by cl. 2, and recovered from their underwriters, those underwriters could by subrogation recover over from the charterer under these words in cl. 9.

I should add that much reliance was placed by Mr. Sellers on evidence that when the captain was told to leave the port on the night of October 13 he objected on the ground that the weather was threatening and his crew tired, and asked to be allowed to wait till next morning, but was overruled by the charterer's representatives. This seems to have weighed with the judge, who, in the course of his judgment, says that the ship " was proceeding on the night of October 13 out of the " estuary and beyond solely in compliance with the orders of " the agent of the charterer and against the better judgment of " the master, a judgment which had been clearly expressed to the " charterer's agent, and, as I believe, overruled." This incident seems to me to be entirely irrelevant. It is mere matter of prejudice. It may go to suggest that this is a hard case on the owners, or would have been on their underwriters, if they had chosen to insure, but a hard case may well result in very bad law in the interpretation of this contract. I say the incident is irrelevant, for, if the master had obeyed without making any protest, the grounding of the vessel could be argued to be a consequence of his obeying orders as to the " employment of the vessel," and, if his request had been granted, and he had sailed next morning and then gone aground, the damage then resulting could equally be contended to be a consequence of his complying with orders as to the " employment of the vessel." In the result, I think the appeal succeeds and must be allowed with costs here and below.

1943

LARRINAGA STEAMSHIP CO., LD. v. REGEM.

DU PARCQ L.J.: I concur with the judgment which has been delivered.

Appeal allowed.

Solicitor for charterer: *Treasury Solicitor.*
Solicitors for owners: *Lightbounds, Jones & Co.*

J. W. H.

ASHER v. LONDON FILM PRODUCTIONS, LIMITED.

C. A.

1943
Dec. 7, 8.

Revenue—Income Tax—Payments in consideration of cancellation of contract—Assessment under Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *sch. D cases, III r.* 1 (*a*).

The plaintiff was employed by the defendants as a "production "executive" in the production of motion pictures under a contract by which, in addition to certain fixed payments, he was to receive certain percentages on takings and other benefits. By a subsequent agreement the service agreement was cancelled, and the plaintiff expressly released all claims to remuneration and other benefits under it. In consideration of the termination of the service agreement the plaintiff was to receive (inter alia) sixty per cent. of the takings (if any) in excess of £110,000 from two named motion pictures. Certain payments became due under this agreement, and in making them the defendants deducted income tax at the rate then in force. The plaintiff denied their right to make the deduction, and the decision of the court was sought in a friendly action in which the plaintiff claimed payment of the amount deducted:—

Held, by the Court of Appeal, (i.) that the plaintiff was not carrying on a vocation within Case II of sch. D of the Income Tax Act, 1918, nor were the payments to him under the cancellation agreement either remuneration for services or a pension taxable under sch. E; (ii.) that Case III, r. 1 (*a*), of sch. D would cover the payments by the words "any . . . . annual payment ". . . . as a personal debt or obligation by virtue of any "contract"; (iii.) that such payments being "pure income "profit," tax was properly deducted therefrom under r. 21 of the All Schedules Rules; (iv.) that Case VI of sch. D was automatically excluded by the application of Case III.

Observations on the position of the Crown in litigation between subjects involving questions relating to taxation.

Decision of Atkinson J. affirmed on different grounds.

C. A.

1943

ASHER
v.
LONDON
FILM PRODUCTIONS,
LD.

APPEAL from Atkinson J.

By an agreement in writing, dated July 14, 1938, the defendants, London Film Productions, Ld., agreed to employ the plaintiff Irving Asher as a " production executive " for two years from May 23, 1938. The plaintiff was to receive as " compensation for his services," in addition to certain fixed remuneration, various percentages on the net profits of motion pictures produced during the term of his engagement and released for distribution either throughout the world or in British territory. He was also given by this service agreement certain other rights and benefits. By a second agreement (the " cancellation agreement ") dated June 7, 1939, the service agreement was cancelled, and the plaintiff released the defendants from any obligation or liability to pay him any of the percentages mentioned in the service agreement, or to provide the other benefits to which he would have been entitled. In consideration of the termination of the service agreement, the company agreed to pay the plaintiff, in addition to two cash sums which were not material to this case sixty per cent. of all moneys (if any) in excess of 110,000*l.* actually received by the company or its subsidiary Harefield Productions, Ld., in respect of two named motion pictures. Ten sums had become payable under the cancellation agreement in respect of those pictures, and the defendants had, in paying the said sums to the plaintiff, deducted from each of them income tax at the rate of ten shillings in the pound. The plaintiff contended that there was no right to deduct income tax, and the parties agreed that the decision of the court should be obtained in this friendly action, in which the plaintiff claimed payment of the amount, 1,727*l.* 2*s.* 5*d.*, so deducted and the defendants claimed to be entitled or bound to make the deductions under r. 19 or r. 21 of the All Schedule Rules of the Income Tax Act, 1918 (1).

(1) Income Tax Act, 1918, All Schedules Rules, r. 19, para. 1: " Where any . . . . annual pay- " ment (whether payable within or " out of the United Kingdom, " . . . . as a personal debt or " obligation by virtue of any con- " tract . . . .) is payable wholly " out of profits or gains brought " into charge to tax, no assessment " shall be made upon the person " entitled to such . . . annual " payment, but the whole of those " profits or gains shall be assessed " and charged with tax on the " person liable to the . . . . an- " nual payment, without dis- " tinguishing the same, and the " person liable to make such pay- " ment . . . . shall be entitled, " on making such payment, to " deduct and retain thereout a " sum representing the amount of " the tax thereon . . . ."

Rule 21, para. 1: " Upon pay- " ment of any . . . . annual pay-

Atkinson J. held that the tax was rightly deducted, and the plaintiff appealed.

Tucker K.C. and *Mustoe* for the plaintiff. The defendants were wrong in deducting income tax in respect of the ten payments made by them to the plaintiff under the cancellation agreement. The deductions are not justified under either r. 19 or r. 21 of the All Schedules Rules to the Income Tax Act, 1918. The point was taken in the defendants' pleadings but abandoned in the court below that having regard to r. 22 the court had no jurisdiction to deal with the matter which must be left to the general commissioners of the division. But under r. 22 the general commissioners are only to decide the proportion of a payment to be deducted and not whether a payment is an annual payment under rr. 19 and 21. In the court below the only matter considered was whether the ten payments were capital or income and they were held to be income payments. But the real question is whether these payments were annual payments within Case III of sch. D: see *In re Hanbury* (1) and *Earl Howe* v. *Inland Revenue Commissioners* (2). It has to be remembered that rr. 19 and 21 are merely tax collecting provisions. The deduction of tax in making the payments

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"ment charged with tax under "Schedule D . . . . not payable "or not wholly payable out of "profits or gains brought into "charge, the person by or through "whom any such payment is made "shall deduct thereout a sum "representing the amount of the "tax thereon."

Schedule D. Case II: "Tax in "respect of any profession, em"ployment or vocation not con"tained in any other Schedule;"

Case III: "Tax in respect of "profits of an uncertain value "and of other income described in "the rules applicable to this "Case." Rule 1: "The tax shall "extend to (*a*) any interest of "money, whether yearly or other"wise, or any annuity, or other "annual payment, whether such "payment is payable within or "out of the United Kingdom, "either as a charge on any pro"perty of the person paying the "same by virtue of any deed or "will or otherwise, or as a reserva"tion thereout, or as a personal "debt or obligation by virtue of "any contract, or whether the "same is received and payable "half-yearly or at any shorter or "more distant periods."

Case VI: "Tax in respect of "any annual profits or gains not "falling under any of the fore"going Cases, and not charged by "virtue of any other Schedule."

Sch. E.: By s. 18 (1.) of the Finance Act, 1922, "profits or "gains arising or accruing to any "person from an office, employ"ment or pension" were transferred from sch. D to sch. E.

(1) (1939) See 20 Ann. Tax. Cas. 333.

(2) [1919] 2 K. B. 336.

C. A.

1943

ASHER v. LONDON FILM PRODUCTIONS, LD.

in question is not right if the payments in the plaintiff's hands are receipts in respect of the giving up of an employment under sch. E or receipts by him as a person carrying on a vocation within Case II of sch. D or annual profits within Case VI of sch. D. In none of these cases have the payments the quality of " pure income profit " as under Case III. They are payments to be taken into account in calculating profits: see *Att.-Gen.* v. *Metropolitan Water Board* (1).

There are special provisions in regard to such matters as royalties: see r. 19, sub-s. 2, as to patent royalties. The plaintiff here is a film producer and his position is not unlike that of an actor, as to whom see *Davies* v. *Braithwaite* (2). The plaintiff is carrying on a vocation within Case II and is assessed on the profits or gains of that vocation. If, however, his employment was an employment of profit within sch. E then the payments made to him for leaving his employment are in the nature of pension and therefore directly assessable under sch. E and not deductible under rr. 19 and 21. Alternatively, the payments are in the nature of deferred remuneration within r. 5 of the rules applicable to sch. E, and therefore taxable at a lower rate as being payments in respect of a year of employment. [Lord GREENE M.R. The difficulty is that the court is not informed of the nature of the plaintiff's business.]

If the plaintiff is not taxable under sch. E or Case II of sch. D, he is assessable under Case VI of sch. D which catches up annual profits or gains not falling under any of the earlier Cases. In any case the payments do not fall within Case III and the deduction of tax was therefore not one that could properly be made.

Scrimgeour for the defendants. This is precisely covered by Case III of sch. D as being " in respect of profits of an uncertain " value," and falling within r. 1 of that case as " an annual " payment . . . . by virtue of any contract." Here is a man who has agreed to surrender a profitable contract of employment, in consideration of payments, uncertain in amount, measured by a percentage of the other party's profits of certain transactions.

That is neither carrying on a vocation within Case II of sch. D nor remuneration for services under sch. E. Indeed, by the cancellation agreement the plaintiff expressly gives up any right to remuneration. Nor is it in any sense a pension,

(1) [1928] 1 K. B. 833.

(2) [1931] 2 K. B. 628.

which is in the nature of deferred remuneration, and involves payments of fixed sums. Here the payments must be variable, and there might have been none at all if the pictures failed to earn the basic figure of 110,000*l.*

It is unnecessary to have recourse to Case VI of sch. D, which is only applicable if no other case applies, and here the right Case is Case III. Even if Case VI did apply, it is not clear that tax can never be deductible at the source under that Case. He referred to *Commissioners of Inland Revenue* v. *Ramsay* (1).

Mustoe replied.

LORD GREENE M.R. This appeal arises out of a friendly controversy between the defendants, London Film Productions, Ld., and the plaintiff, Mr. Asher, with whom they have certain contractual relations. Under the relevant contract sums have fallen and will fall to be paid to Mr. Asher by the defendants. The controversy is whether the defendants, in making these payments, are entitled to deduct tax under r. 21 of the All Schedules Rules of the Income Tax Act, 1918. Mr. Asher contends that, if these receipts be of an income nature, he is only liable to direct assessment. If that contention were correct, there would be no legal right in the defendants to deduct the tax.

The question is staged by an action brought by Mr. Asher to recover from the defendants the amount of the deduction. I have often thought that in cases of this kind it is extremely inconvenient that the Crown (which is vitally interested) cannot, under the existing procedure, be made a party, or otherwise appear. The result is that the Crown is technically not bound by any decision which may be pronounced in its absence. It may well be that in cases of this kind the practice of the Inland Revenue is to accept the decision which is merely a decision as between two subjects. Cases might well arise, however, where the Crown was unwilling to accept that decision and might itself embark upon litigation, possibly with new facts. The result would be highly inconvenient, and I venture to suggest that the Inland Revenue authorities might usefully consider approaching the Rule Committee with a view to obtaining the enactment of a rule under which they could receive notice of litigation of this kind and be given a right to attend and put forward any argument or facts they thought right. The

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(1) (1935) 20 T. C. 79.

C. A.
1943

ASHER
v.
LONDON
FILM PRODUCTIONS,
LD.

Lord Greene
M.R.

corollary would be that they would be bound by the decision, and the whole matter would be cleared up between everybody concerned. However, under the present practice, all we can do is to decide the matter as an issue between two subjects on the evidence that is put before us.

[His Lordship summarized the relevant terms of the "service" and "cancellation" agreements, and continued :] Before Atkinson J., the main, if not the only, argument on the part of Mr. Asher appears to have been that the sums receivable under the cancellation contract were, in his hands, not income but capital. Atkinson J. refused to accept that argument. It has not been put before us ; and, in my opinion, his view on that subject was right. That, however, does not end the matter. It gets the case as far as this. These sums are in the nature of income, and as such fall within the income tax net. The question still remains (with which Atkinson J., in view of the argument presented to him, did not deal), whether, in falling into that net, they come in the category of income which is subject to deduction by the payer or in the category of income in respect of which direct assessment should be made. That is the real controversy, which is not decided merely by saying that these sums have an income quality.

The case for the plaintiff was rested on several alternative arguments. First of all, it was said that the receipts under this contract are assessable under Case II of sch. D which deals with "tax in respect of any profession, employment or vocation "not contained in any other Schedule." The word "employment" there must now be read subject to s. 18 of the Income Tax Act, 1922, which transfers certain employments to sch. E. The argument here was that Mr. Asher was carrying on the profession or vocation of a film producer. It was said that in respect of that he would be assessable under Case II and that his receipts under the cancellation agreement would be elements in his professional or vocational receipts, and would have to be dealt with as such on a direct assessment. It was said that, on the basis that he was carrying on a profession or vocation, the receipts which come to him under a cancellation agreement are just as much professional or vocational receipts as receipts from the performance of an agreement made in the course of carrying on the profession or vocation. Cases are not unfamiliar where it has been held, in the case of trading operations which are assessable under Case I, that receipts from the cancellation of an ordinary trade agreement made in the day to day course of the trade are regarded for tax purposes as receipts of the trade just as much as the receipts received under the carrying out of an ordinary trade agreement. But whether that principle applies or does not apply to professions or vocations may be another question altogether, the answer to which may depend on the facts of individual cases. In the present case there is no need, in my opinion, to go into that controversy, because I will assume that the argument is right, and that if Mr. Asher is assessable under Case II, these receipts would be receipts in respect of his profession or vocation, and would not be receipts under a personal debt or obligation by virtue of a contract under r. 1 (*a*) of Case III. But I am entirely unconvinced by the argument that Mr. Asher is or was carrying on any " profession or vocation " at all according to the true meaning of those words.

[His Lordship gave his reasons for this finding on the facts.] His occupation was more the occupation of a manager, who is engaged under a service contract to manage a branch of a business. I have yet to learn that a manager or a managing director is carrying on " a profession or vocation." Contracts of that kind are, I should have thought, mere contracts of employment and nothing else. Mr. Asher, therefore, fails in his contention that he is assessable under Case II.

Before I look at the other cases in sch. D, I turn to the argument that the case falls under sch. E. It is not necessary to discuss what the position would or might have been under the original service agreement, had that agreement remained in force. What we have to consider is whether or not the receipts under the cancellation agreement are taxable under sch. E, in which case they would be taxable by direct assessment, the taxpayer being entitled to such deductions as are provided for in r. 9 of the rules applicable to sch. E. It is said that, if the receipts do not come under Case II of sch. D, they come under sch. E. The first argument was that these receipts are a pension. In my opinion, they cannot be regarded as anything of the kind. They are, and are expressed to be, compensation for the cancellation of a contract. Anything less like a pension I find it difficult to think of. Then it was said, even if they are not a pension they are profits from an employment in the sense that they are referable to the services performed under the service agreement and must be regarded as remuneration for services so rendered in the past. Atkinson J. in the concluding paragraph of his judgment,

C. A.

1943

Asher v. London Film Productions, Ld.

Lord Greene M.R.

appears to have favoured that view, but, in my opinion, that view cannot be sustained, having regard to the clear language of the agreement itself, which sets out beyond possibility of doubt what the precise consideration is for these payments. It seems to me impossible to say that the parties agreed that Mr. Asher should be remunerated for his past services. He gave up expressly in the cancellation contract any claim to any remuneration in respect of what he had done in the past, and I cannot regard those payments as in any sense remuneration which is to be related to his contract of employment. Therefore, in my opinion, sch. E is not the proper schedule under which Mr. Asher would fall to be assessed in respect of these receipts.

Before examining the other relevant cases of sch. D, I must say a word on the subject of rr. 19 and 21 of the General Rules. In the present case r. 21 would be applicable because the defendant company is not in a position to say that these payments were made " out of profits or gains brought into " charge." Therefore, the tax that they would deduct, if they were entitled to deduct it, they would have to hand over to the revenue. In *In re Hanbury* (1) I endeavoured, in the course of a judgment, with which the other two members of the court agreed, to set out what appeared to me to be the proper scope of rr. 19 and 21. I do not propose to examine that judgment, but merely to extract from it a phrase which I think is a convenient one for the purpose of distinguishing the class of income taxable by deduction from the class of income which merely becomes an element in the computation of profits and gains. The phrase I used was " pure income profit." I pointed out that rr. 19 and 21 were concerned with " pure income " profit " and anything that was not " pure income profit " did not fall within their scope.

Turning back to sch. D, the case for the defendants is that these payments fall under Case III. It seems to me that, once Case II is excluded and once sch. E is excluded, the language of r. 1 (*a*) of Case III covers the present case. These payments are payable as a " debt or obligation " by virtue of this contract which, as Mr. Scrimgeour rightly points out, is the sole source of the income. Therefore, it seems to me that the language falls precisely within the language of r. 1 (*a*). The payments are annual payments in the sense that they have that recurrent quality which is the distinguishing mark differentiating an income payment from a capital payment for these purposes. You can have an annual payment under this rule, even though it happens by some accident or other to fall due in one year only. The question is, has it the necessary periodical or recurrent quality ?

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(1) (1939) See 20 Ann. Tax Cas. 333.

If that view is right, Mr. Tucker's next argument necessarily falls to the ground, because he says, as his last point, that the case falls within Case VI. If I am right in thinking that the case does fall under Case III, it is automatically excluded from Case VI. Having regard to the view which I have formed, it is unnecessary to consider what is precisely the scope and application of Case VI, and particularly the question whether Case VI cases are always examples, or necessarily examples, of direct assessment. It may or may not be so. I may say, however, for the sake of caution that that question, whether there might be cases under Case VI to which rr. 19 and 21 would apply, was not discussed in *In re Hanbury* (1). It was irrelevant to the point then before us. It may or may not be the fact that in some cases under Case VI, rr. 19 and 21 would apply, because a curious miscellaneous collection of receipts has, by statute, been brought under Case VI. I express no opinion upon that point. There may be nothing in the point, but I wish to refer to it by way of precaution.

If the views which I have expressed are correct, that is an end of the case. The result is that the decision of Atkinson J. is right ; but the reasons which he gave, although in my opinion correct as far as they went, did not sufficiently cover the ground.

The result is, the appeal must be dismissed with costs.

MACKINNON L.J. I agree with the judgment of the Master of the Rolls. In view of the appalling complexity of the statutes involved here, I may be forgiven for saying that his conclusion is not one arrived at with ease, though he has overcome the difficulties of the case so lucidly. But there was one passage in his judgment (with which I am in complete agreement), to which assent is very easily reached on manifest grounds—I mean the passage in which he pointed out that where a question arises between two subjects as to the duty of one of them to act under r. 19 or under r. 21 of the All Schedules rules, it is a misfortune that legal machinery does not exist whereby the Commissioners of Inland Revenue can be represented as parties

(1) (1931) See 20 Ann. Tax Cas. 333.

C. A.
1943
ASHER
v.
LONDON
FILM PRODUCTIONS,
LD.

to the argument and be bound by the decision. I agree that the appeal fails.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors for plaintiff: *Kenneth Brown, Baker, Baker.*
Solicitors for defendants: *Linklaters & Paines.*

J. W. H.

C. A.
1943
Nov. 8, 22.

In re AFFAIRS OF D. S. SMITH.

Appeal—Court of Appeal—Appeal from county court—Time for appeal—Emergency legislation—Liabilities adjustment order—Application to county court judge to vary—Refusal—R. S. C., Or. 58, *r.* 20 (*a*); *Or.* 59, *r.* 34 (4) (*as amended by R. S. C.* (*No.* 8), 1940, *r.* 1 (1) (*a*) (*ii*) (*St. R. & O.*, 1940, *No.* 1983/*L.*36))—*Liabilities* (*War-Time Adjustment*) *Act*, 1941 (4 & 5 *Geo.* 6, *c.* 24), *s.* 10, *sub-s.* 2.

A person, who had property mortgaged to a building society, was granted by a county court judge a protection order under the Liabilities (War-Time Adjustment) Act, 1941. The mortgagees did not prove their debt, but they informed the liabilities adjustment officer, who was directed to investigate the debtor's affairs, that they relied on their security. After receiving the report of the adjustment officer, the county court judge, on March 6, 1943, made an adjustment order which did not provide for payment to the mortgagees of mortgage interest since the date of the protection order. The order contained a provision that any party thereto might apply to the court for such variations of the order as might become necessary. The mortgagees did not appeal to the Court of Appeal within the 25 days prescribed by R. S. C., Or. 58, r. 20 (*a*) and Or. 59, r. 34 (4), as amended by R. S. C. (No. 8), 1940, r. 1 (1) (*a*) (ii), but on June 29, 1943, they applied to the county court judge to vary the adjustment order by providing therein for payment to the mortgagees of the mortgage interest. The county court judge refused to vary his original order and the mortgagees appealed from that refusal to the Court of Appeal:—

Held, (1.) that the mortgagees were not creditors whose debt had been proved, and that, therefore, they were not competent to apply to the county court under s. 10, sub-s. 2, of the Act of 1941, to vary the original order. (2.) That s. 10, sub-s. 2, only gave the court power to amend its order when the circumstances had changed, and that it did not give a person who challenged the validity of the order a right of appeal from it by way of an application to vary it after the time for an appeal to the Court of Appeal had expired and then an appeal to the Court of Appeal from the refusal to vary. (3.) That the provision in the adjustment order giving any party thereto a right to apply to the court for a variation of the order did not give a party a right to challenge the validity of the order at any time thereafter. That challenge must be made by way of appeal to the Court of Appeal from the order and could only be made within the time prescribed by the Rules of Court for appeals.

APPEAL from Lowestoft county court.

In 1936 the debtor, David Strangman Smith, acquired certain property for 360*l.* and mortgaged it to the Ipswich and Suffolk Permanent Benefit Building Society to secure an advance of 320*l.* Under the mortgage deed the principal and interest were payable by fortnightly instalments of 17*s.* 7*d.* Owing to the war, the debtor did not pay the fortnightly instalments after May, 1940. On January 16, 1942, the debtor applied to the county court under the Liabilities (War-Time Adjustment) Act, 1941, for a protection order, and an order was made on February 6, 1942. Under that order the liabilities adjustment officer investigated the debtor's affairs and made his report to the county court judge. The mortgagees did not prove for their debt, and they informed the liabilities adjustment officer that they relied on their security. On March 6, 1943, the county court judge made an adjustment order which contained no reference to the secured creditors and made no provision for payment of the interest under the mortgage. The order contained the following provision in para. 10: "The adjustment officer or any party hereto may "apply to the court for such directions or for such variation of "this order as may become necessary as he she or they may "be advised." On June 29, 1943, the mortgagees made an application to the county court judge to vary the adjustment order by providing for the payment to the mortgagees of the mortgage interest which had accrued since the date of the protection order. The county court judge, in the exercise of his discretion, refused to vary his original order. The mortgagees appealed to the Court of Appeal against that refusal.

H. P. Solomon for the mortgagees.

Valentine Holmes for the liabilities adjustment officer. There is a preliminary objection to the hearing of this appeal. The appeal is out of time. Under R. S. C., Or. 58, r. 20 (*a*) and Or. 59, r. 34 (4), as amended by R. S. C. (No. 8), 1940,

C. A.

1943

Affairs of D. S. Smith, *In re.*

r. 1 (1) (*a*) (ii.), all appeals from the county courts to the Court of Appeal shall be by notice of motion which must be served and the appeal entered within twenty-five days from the date of the judgment, order or decision complained of. The adjustment order was made on March 6, 1943, and, therefore, an appeal to the Court of Appeal against that order should have been entered by April 1. The mortgagees did not appeal to the Court of Appeal. They applied to the county court judge on June 29, 1943, after the time for appealing to the Court of Appeal had expired, to vary his original order. That application was made under s. 10, sub-s. 2, of the Act of 1941 (1), but the mortgagees had no locus standi to make it under the section as they were neither the debtor, nor the liabilities adjustment officer, nor a creditor whose debt had been proved. Section 10, sub-s. 2, does not apply to a case where the ground of the application is that the original order was made by the county court judge without jurisdiction. It only applies where there has been a change of circumstances which makes it desirable that the form of the order should be altered.

Solomon for the mortgagees. The application to vary was not made to the county court judge under s. 10, sub-s. 2, of the Act of 1941, but under para. 10 of the adjustment order which provided that any party to the proceedings might apply to the county court judge for directions or a variation of the order. The mortgagees were parties to the proceedings in which the original order was made, and they were, therefore, entitled to apply for a variation of the order. The presumption is that the county court judge acted correctly when he gave leave in the adjustment order to the parties to make an application to vary that order.

Cur. adv. vult.

Nov. 22. Simonds J. read the following judgment of the court (Scott L.J. and Simonds J.): On March 5, 1943, an adjustment order under the Liabilities (War-Time Adjustment) Act, 1941, was made by the county court at Lowestoft in respect of David Strangward Smith, a debtor. It was an order which inter alia determined the rights of the debtor's

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(1) Liabilities (War-Time Adjustment) Act, 1941, s. 10, sub-s. 2: "Any liabilities adjustment order or protection order may, on the application of the debtor or of any creditor whose debt has been proved or of the liabilities adjustment officer, be varied by a subsequent order . . . ."

C. A.
1943
AFFAIRS OF
D. S. SMITH,
In re.

secured creditors, including the Ipswich and Suffolk Permanent Benefit Building Society, who claimed to be mortgagees of certain property of the debtor known as 3 Wash Lane, Kessingland, in the County of Suffolk. On June 29, 1943, an application was made by the society to the same county court for the variation and amendment of the adjustment order by providing for payment to them of certain mortgage interest out of the rents and profits of the property of which they were mortgagees. From the refusal of the county court judge to vary or amend the adjustment order the society appeals to this court, alleging, in the first place, that the adjustment order was in part at least invalid in that the county court judge was not competent under the Act to make or omit such provisions in regard to mortgagees as the order contained or omitted, and, in the second place, that the county court judge, even if he had the power to make the order, had not properly exercised his discretion in making it.

We do not think it necessary to express any opinion on these questions, for counsel for the liabilities adjustment officer, whose duty it was to assist the court, has taken the preliminary point that the society's application, made on June 29, 1943, was out of order and should not have been entertained by the county court judge, and that an appeal from his order should not be entertained by this court. In our judgment, the preliminary point succeeds. Section 10, sub-s. 2, of the Act, provides that " any liabilities adjustment order or protection " order may, on the application of the debtor or of any creditor " whose debt has been proved or of the liabilities adjustment " officer, be varied by a subsequent order." The society was not a creditor whose debt had been proved, and, accordingly, was not a person competent to apply under the sub-section. Nor, indeed, if the society was a competent applicant, was the application to vary one that fell within the scope of the sub-section, for, in our judgment, it is clear that the sub-section aimed at giving the court power to amend or vary its original order where circumstances have changed, or, perhaps, unknown circumstances have come to light. It cannot be interpreted so as to give to a person who challenges the validity of an order a right of appeal from it by way of an application to vary after the time for appeal to the Court of Appeal has expired and then an appeal to the Court of Appeal from the refusal to vary.

Faced by this difficulty, counsel for the society has urged that the application to vary was not made under s. 10, sub-s. 2, of the Act, but under the provisions of the order itself which, by cl. 10, provides that "the adjustment officer or any party "hereto may apply to the court for such directions or for "such variation of this order as may become necessary as he "she or they may be advised." The society was a "party" to the proceedings in which the order was made, and we will assume without deciding that it was competent to the county court judge to reserve to them a right to apply for variation of the adjustment order which s. 10, sub-s. 2, of the Act does not give to them. But he could not, nor does the order, when fairly interpreted, give them a right to challenge the validity of the order at any time thereafter. That is a challenge which can only effectively be made by way of appeal to the Court of Appeal from the order and can only be made within the time prescribed by the relevant rules of court or such further time as the court allows. The preliminary objection, therefore, succeeds, and the appeal must be dismissed.

Preliminary objection upheld.
Appeal dismissed.

Solicitors for mortgagees: *E. F. Iwi, for Birkett, Ridley & Cox, Ipswich.*

Solicitor for liabilities adjustment officer: *Treasury Solicitor.*

R. F. S.

1943
Nov. 11.

DIRECTOR OF PUBLIC PROSECUTIONS *v.* KENT AND SUSSEX CONTRACTORS, LIMITED.

Corporation—Offence—Act of will or state of mind—Liability of company for act of agent—Defence (General) Regulations, 1939, regs. 82 (1) (c), 82 (2)—Motor Fuel Rationing (No. 3) Order, 1941 (St. R. & O., 1941, No. 1592), art. 12 (1).

Informations were preferred against the respondent company under regs. 82 (1.) (*c*) and 82 (2.) of the Defence (General) Regulations, 1939, charging them that for the purposes of the Motor Fuel (No. 3) Rationing Order, 1941, they, with intent to deceive, made use of a document, signed by the transport manager of the company, which was false in a material particular, and that in furnishing information in the document for the purposes of the order, they made a statement which they knew to be false in a material particular. The document was false in the particular alleged to the knowledge of the servants of the respondent company. The justices were of opinion that the company could not in law be guilty of the offences charged since there was implicit in those offences an act of will or state of mind which could not be imputed to a body corporate :—

Held, that the justices were wrong and that the company could be convicted of the offences charged.

CASE stated by Glamorgan Justices.

Informations were preferred by the appellant, the Director of Public Prosecutions, against the respondent company, Kent and Sussex Contractors, Ld., charging the company that on or about December 27, 1941, they (1.) with intent to deceive made use, for the purpose of the Motor Fuel Rationing (No. 3) Order, 1941, made pursuant to reg. 55 of the Defence (General) Regulations, 1939, (1) of a document, namely, a fortnightly vehicle record in respect of a specified vehicle, which was false in a material particular in that it misstated the journeys and mileage done by the vehicle in question from December 15 to December 27, 1941, contrary to reg. 82 (1.) (*c*) of the Defence (General) Regulations, 1939, (1) and (2), that, in furnishing information on the appropriate form in respect of the said vehicle for the purposes of the order, they made a statement which they knew to be false in a material particular contrary to reg. 82 (2.) of the Defence (General) Regulations, 1939 (1).

It was proved at the hearing that on December 27, 1941, the respondent company sent to the proper authority on the prescribed form a fortnightly vehicle record containing the alleged

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(1) By Motor Fuel Rationing (No. 3) Order, 1941, art. 12 (1.) : "Every person desiring to obtain "—(*a*) a licence under any of the "provisions of this order, or "(*b*) coupons for the purposes of "this order, shall furnish such "information :—(i.) as may be re-"quested by or on behalf of the "Board of Trade ; (ii.) as may be "prescribed by direction of the "Board of Trade and any such "direction may specify the form "in or on which such information "is to be furnished."

(2) By Defence (General) Regulations, 1939, reg. 82 (1.) : "If, "with intent to deceive, any "person (*a*) . . . . for the pur-"poses of any of these regulations "or of any order, ... made "under any of these regulations ; "(*c*) produces, furnishes, sends or "otherwise makes use of, for the "purposes aforesaid, any book, "account, estimate, return, "declaration, or other document "which is false in a material "particular ; he shall be guilty "of an offence . . . ." (2.) "If, "in furnishing any information "for the purposes . . . . of any "order . . . . made under any "of these regulations, any person "makes any statement which he "knows to be false in a material "particular, ... he shall be "guilty of an offence . . . ."

1943

DIRECTOR OF PUBLIC PROSECUTIONS v. KENT AND SUSSEX CONTRACTORS, LD.

misstatement, the document being signed by the transport manager of the company. The justices found that the record was false in the material particular alleged to the knowledge of the servants of the company, but they held that a body corporate could not in law be guilty of the offences charged, since an act of will or state of mind, which could not be imputed to a corporation, was implicit in the commission of those offences. They, accordingly, dismissed the informations against the respondents. The appellant appealed.

Colin Duncan for the appellant. The decision of the justices was wrong. A company is a fictional entity and the ordinary doctrine relating to master and servant cannot be applied when dealing with criminal offences committed by the officers of a company. In ordinary cases it may be right to say that a master cannot be held responsible for the criminal acts of his servants, because the servant is a separate persona from the master, but a company can only commit offences by its servants. In *Rex* v. *Cory Brothers and Co.* (1) it was held that an indictment will not lie against a company either for felony or a misdemeanour involving personal violence under s. 1 of the Offences Against the Person Act, but in *Triplex Safety Glass Co., Ld.* v. *Lancegay Safety Glass Co., Ld.* (2) du Parcq L.J. said that it was possible to prove against a limited company all the constituent elements of the crime of publishing a defamatory libel, the vital ingredients of which is a malicious state of mind. If a company can be guilty of malice, it must be assumed to have that kind of fictitious mind which can be affected with malice. Equally so, it can have knowledge and an intent to deceive and so can be held to be guilty of the offences charged in the present case.

Carey Evans for the respondent company. The decision of the justices was right. It is conceded that a limited company can have an intention, and, in some cases, knowledge, by its servants. It is also conceded that a company may have a criminal intent by its servants, but it cannot be guilty of the particular criminal intention which has to be proved in the present case. Whenever a statute or a regulation creates an offence and makes it clear that mens rea is a necessary ingredient of that offence, a corporation cannot be criminally responsible for such an offence committed by its servants on proof that they

(1) [1927] 1 K. B. 810.

(2) [1939] 2 All E. R. 613.

had mens rea any more than an innocent individual master would be. A company can only intend and know through its servants, but it can only be responsible for the guilty knowledge of its servants in those cases in which a statute or regulation creating an offence expressly or impliedly makes it clear that a corporation shall be responsible for the guilty knowledge of its servants: see per Cave J., in *Chisholm* v. *Doulton* (1); *Pearks, Gunston & Tee, Ld.* v. *Ward* (2). In the offences charged here, criminal intention or guilty knowledge is an essential ingredient, and there is nothing in the regulation which provides that, notwithstanding that the guilty knowledge is in the servants only, a corporation can be held liable. *Mousell Bros., Ld.* v. *London and North Western Ry.* (3) shows that when mens rea is not a necessary ingredient of the offence a company can be convicted in respect of the act of its servant in the same way as any other principal. It has never been suggested that a company can be prosecuted for receiving goods knowing them to have been stolen when the knowledge is that of the servants of the company. [He also referred to *Mackay* v. *Commercial Bank of New Brunswick* (4); *Law Society* v. *United Service Bureau, Ld.* (5), and *Parker* v. *Price* (6).]

VISCOUNT CALDECOTE C.J. [after stating the facts]. This special case raises the question whether a limited company, being a body corporate, can in law be guilty of the offences charged against the respondents, or whether a company is incapable of any act of will or state of mind such as that laid in the information. Mr. Carey Evans submits that a company can only be held to be responsible in respect of the intention or knowledge of its agents, the officers of the company, to the same extent as a private individual is responsible for the acts of his agent, and, therefore, that the respondent company cannot be held to form the intention or to have the knowledge necessary to constitute the offences charged. He has not disputed the abstract proposition that a company can have knowledge and can form an intention to do an act. A company cannot be found guilty of certain criminal offences, such as treason or other offences for which it is provided that death or imprisonment is the only punishment, but there are a number of criminal offences of which a company can be convicted. In the judgment of Finlay J. in *Rex* v. *Cory Bros. and Co.* (1), there is a convenient citation from the judgment of Patteson J. in *Reg.* v. *Birmingham and Gloucester Ry. Co.* (2). This citation begins with the quotation of a note by Holt C.J.: " A corporation is not indictable, but the particular members of " it are." Patteson J. is then quoted as saying: " What the " nature of the offence was to which the observation was " intended to apply does not appear; and as a general proposi-" tion it is opposed to a number of cases, which show that a " corporation may be indicted for breach of a duty imposed " upon it by law, though not for a felony, or for crimes involving " personal violence, as for riots or assaults." Under the Defence (General) Regulations, 1939, it is common for offences to be created in which certain ingredients are required to be found and the present case seems to me to fall within that category. They are offences in which it is not material to consider whether there is or is not mens rea, which I understand to mean criminal intention, because the ingredients are stated in the regulation creating the offence. For instance, in the present case one of the necessary ingredients of the second offence charged is an intent to deceive. When that intent is stated to be necessary it seems to me idle to inquire whether a mens rea is or is not involved.

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(1) (1889) 22 Q. B. D. 736, 741.

(2) [1902] 2 K. B. 1.

(3) [1917] 2 K. B. 836.

(4) (1874) L. R. 5, P. C. 394.

(5) [1934] 1 K. B. 343.

(6) Unreported, Mar. 31, 1943.

In the course of the argument we have been referred to a number of cases, including *Mackay* v. *Commercial Bank of New Brunswick* (3), in support of the submission made by Mr. Carey Evans, to which I have referred. The opinion of their lordships in that case, which was given by Sir Montague Smith, includes this passage from the judgment of Lord Cranworth in *Ranger* v. *Great Western Ry. Co.* (4), which I most respectfully accept: " Strictly speaking a corporation cannot itself be " guilty of fraud. But where a corporation is formed for the " purpose of carrying on a trading or other speculation for " profit, such as forming a railway, these objects can only be " accomplished by the agency of individuals; and there can be " no doubt that if the agents employed conduct themselves " fraudulently, so that if they had been acting for private " employers the persons for whom they were acting would " have been affected by their fraud, the same principles must " prevail where the principal under whom the agent acts is a " corporation." That passage was called to our attention by Mr. Carey Evans as showing that it is only in cases where, if the agent had been acting for private employers, the latter would have been affected by their agent's fraud, that a corporation can be held liable for the acts of its agent. This seems to be beside the real point which we have to decide, which is, I repeat, whether a company is capable of an act of will or of a state of mind, so as to be able to form an intention to deceive or to have knowledge of the truth or falsity of a statement.

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(1) [1927] 1 K. B. 810, 816.

(2) (1842) 3 Q. B. 223.

(3) L. R., 5 P. C., 394.

(4) (1854) 5 H. L. C. 72, 86.

In *Chuter* v. *Freeth & Pocock, Ld.* (1) to which we were not referred, the question seems to me to have been similar to the one raised in this case. The headnote is: " By sec. 20, sub-s. 6, " of the Sale of Food and Drugs Act, 1899, it is enacted that " every person who, in respect of an article of food or drug " sold by him, gives to the purchaser a false warranty in writing, " shall be liable on summary conviction to a fine as therein " mentioned, unless he proves that when he gave the warranty " he had reason to believe that the statements or descriptions " contained therein were true:—Held, that a joint stock " company incorporated under the Companies Acts can be " convicted of an offence under the above enactment." I should read a statement in the special case: " The magistrate, " although upon the facts as above stated he would have " convicted if the respondents' servants had been principals " in the matter, was yet of opinion that, as the exempting " clause of the section implied that only such a person could " commit the offence as was capable of believing, and as a " corporation having no mind could not exercise that faculty, " the respondents, being a corporation, were not liable under " the section." Lord Alverstone C.J. stated the facts and then said: " The magistrate has held that, inasmuch as ' the " ' person ' who gives a false warranty is made liable unless " he proves that when he gave the warranty ' he had reason to " ' believe' that the statements or descriptions contained therein " were true, therefore ' the person ' cannot be construed as " including a corporation, but must be limited to natural " persons capable of belief. In my view that is too narrow a " construction. Where a person is capable of giving a warranty " that person is liable to a fine. There is no reason why a " warranty should not be given by a corporation. It can give " a warranty through its agents, and through its agents it can " believe or not believe, as the case may be, that the state- " ments in the warranty are true. A similar point has been " raised in cases concerning the liability of a corporation in

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(1) [1911] 2 K. B. 832.

"actions which, in the case of an individual, would involve an "inquiry into a state of mind, such as fraud, libel, or malicious "prosecution. It is well settled that a corporation may be "liable in all those actions. Further, the question in this case "has in substance been decided by Channell J. in *Pearks, "Gunston & Tee, Ld.* v. *Ward.* (1) Taking the principle of "the Act into consideration, there is no reason why in s. 20, "sub-s. 6, 'person' should not include corporation."

In *Pearks, Gunston & Tee, Ld.* v. *Ward* (1) Channell J. dealt at length with this question. He was considering s. 6 of the Food and Drugs Act, 1875, which provides that "no person "shall sell to the prejudice of the purchaser any article of food "or any drug which is not of the nature, substance, and quality "of the article demanded by such purchaser." Sec. 3 of the Act provides that "No person shall mix, colour, stain, or "powder, or order or permit any other person to mix, colour, "stain, or powder, any article of food with any ingredient or "material so as to render the article injurious to health, with "intent that the same may be sold in that state, and no person "shall sell any such article so mixed, coloured, stained, or "powdered. . . . ." In reference to those two sections, Channell J. said: "By the general principles of the criminal "law, if a matter is made a criminal offence, it is essential that "there should be something in the nature of mens rea, and, "therefore, in ordinary cases a corporation cannot be guilty "of a criminal offence, nor can a master be liable criminally "for an offence committed by his servant." I stop there to observe that Channell J. is first dealing with the subject at large. He continues: "But there are exceptions to this rule "in the case of quasi-criminal offences, as they may be termed, "that is to say, where certain acts are forbidden by law under "a penalty, possibly even under a personal penalty, such as "imprisonment, at any rate in default of payment of a fine; "and the reason for this is, that the legislature has thought it "so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is "done, the offender is liable to a penalty whether he had any "mens rea or not, and whether or not he intended to commit a "breach of the law." Again he elaborates those propositions. Then he passes to the section which requires intent to be proved. "As to s. 3 there is a slight difference, because, "reading s. 3 and s. 5 together, it seems that mens rea is

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(1) [1902] 2 K. B. 1, 11, 12.

" involved in the offence, though it need not be proved by the " prosecution, as it must in ordinary criminal cases. It is, " however, so far an element in the offence that if the defendant " succeeds in proving that he had no mens rea he is to be " acquitted, the burden of proof thus being shifted from the " prosecution to the defence. A provision of that kind is " enacted where the legislature desires to prevent the act " from being done, though it is recognized that there may be " cases in which the act is done innocently, and in which the " person ought, therefore, not to be convicted. In those cases " the defendant can prove his innocence; but, as it would be " difficult for the prosecution to prove mens rea if the onus " were upon them to do so in the ordinary way, the enactment is, consequently, framed in this particular way. There " may therefore be more difficulty in applying the rule in those " cases to a corporation than there is under s. 6. Speaking for " myself, I am inclined to think that a corporation would come " under s. 3 as well as under s. 6, but the question is not quite " so clear, and possibly it may have to be argued hereafter." That question is raised in this case.

In *Mousell Bros., Ld.* v. *London and North Western Railway Co.* (1) a question arose on s. 99 of the Railway Clauses Consolidation Act, 1845. Section 98 provides that: " Every " person being the owner or having the care of any carriage " or goods passing or being upon the railway shall, on " demand, give to the collector of tolls, at the places " where he attends for the purpose of receiving goods or " of collecting tolls for the part of the railway on which " such carriage or goods may have travelled or be about " to travel, an exact account in writing signed by him of " the number or quantity of goods conveyed by any such " carriage, and of the point on the railway from which such " carriage or goods have set out or are about to set out, and " at what point the same are intended to be unloaded or " taken off the railway; and if the goods conveyed by any " such carriage, or brought for conveyance as aforesaid, be " liable to the payment of different tolls, then such owner or " other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls." Then s. 99 provided: " If any such owner or other such person fail to " give such account, or to produce his way-bill or bill of lading, " to such collector or other officer or servant of the company

(1) [1917] 2 K. B. 836, 845, 846.

" demanding the same, or if he give a false account, or if he " unload . . . any part of his . . . goods at any " other place than shall be mentioned in such account with " intent to avoid the payment of any tolls payable in respect " thereof, he shall for very such offence " be liable to a penalty. Atkin J. said : " The authorities cited by my Lord make it " plain that while prima facie a principal is not to be made " criminally responsible for the acts of his servants, yet the " legislature may prohibit an act or enforce a duty in such " words as to make the prohibition or the duty absolute ; " in which case the principal is liable if the act is in fact done " by his servants. To ascertain whether a particular Act of " Parliament has that effect or not, regard must be had to the " object of the statute, the words used, the nature of the duty " laid down, the person upon whom it is imposed, the person by " whom it would in ordinary circumstances be performed, and " the person upon whom the penalty is imposed." Then at the end of his judgment he says this : " I see no difficulty in the " fact that an intent to avoid payment is necessary to constitute the offence. That is an intent which the servant might " well have, inasmuch as he is the person who has to deal with " the particular matter. The penalty is imposed upon the " owner for the act of the servant "—of course, the result could only be reached where a person is given express or implied authority or the principal is estopped from saying that he had not the authority—." Once it is decided that this is one " of those cases where a principal may be held liable criminally " for the act of his servant, there is no difficulty in holding that " a corporation may be the principal. No mens rea being necessary to make the principal liable, a corporation is in exactly " the same position as a principal who is not a corporation." It is necessary to bear in mind the position of a company, which is quite different from that of a private individual, a real person. It could not be put better than Lord Blackburn puts it in *Pharmaceutical Society* v. *London and Provincial Supply Association* (1), where he says : " A corporation may " in one sense, for all substantial purposes of protecting the " public, possess a competent knowledge of its business, if it " employs competent directors, managers, and so forth. But " it cannot possibly have a competent knowledge in itself. The " metaphysical entity, the legal ' person,' the corporation, " cannot possibly have a competent knowledge."

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(1) (1880) 5 A. C. 857, 870.

1943

DIRECTOR OF PUBLIC PROSECUTIONS
v.
KENT AND SUSSEX CONTRACTORS, LD.

Viscount Caldecote C.J

Bearing that in mind, I think that a great deal of Mr. Carey Evans' argument on the question whether there can be imputed to a company the knowledge or intent of the officers of the company falls to the ground, because although the directors or general manager of a company are its agents, they are something more. A company is incapable of acting or speaking or even of thinking except in so far as its officers have acted, spoken or thought. In *Law Society* v. *United Service Bureau, Ld.* (1) the matter seems to me to have been made even clearer than in the case to which I have referred. Section 46 of the Solicitors' Act, 1932, provided that: " Any person, not having " in force a practising certificate, who wilfully pretends to be " . . . qualified or recognised by law as qualified to act " as a solicitor, shall be liable on summary conviction to a " penalty. . . ." Avory J. said: " Mr. Strauss has taken " two points in support of the magistrate's decision. The first " is that the qualification contemplated by s. 46 can only be " possessed by a natural person. With that I have already " dealt. The second is that the words ' wilfully pretends ' in " s. 46 could have no application to a corporate body because " ' wilfully ' involves some mens rea which a corporate body " cannot have. I think that that point fails and that a corporate body might ' wilfully pretend ' within the meaning " of s. 46 to be qualified to act as solicitors. It has been laid " down over and over again that where a statute absolutely " prohibits the doing of an act it is sufficient to show that the " person accused did the forbidden act intentionally and that " it is not necessary to go further and prove what is commonly " known as mens rea or any intention other than to do the " thing forbidden."

In the present case the first charge against the company was of doing something with intent to deceive, and the second was that of making a statement which the company knew to be false in a material particular. Once the ingredients of the offences are stated in that way it is unnecessary, in my view, to inquire whether it is proved that the company's officers acted on its behalf. The officers are the company for this purpose. Mr. Carey Evans stoutly maintained the position that a company cannot have a mens rea, and that a mens rea cannot be imputed to it even if and when its agents have been shown to have one, but the question of mens rea seems to me to be quite irrevelant in the present case. The offences created

(1) [1934] 1 K. B. 343, 349.

by the regulation are those of doing something with intent to deceive or of making a statement known to be false in a material particular. There was ample evidence, on the facts as stated in the special case, that the company, by the only people who could act or speak or think for it had done both these things, and I can see nothing in any of the authorities to which we have been referred which requires us to say that a company is incapable of being found guilty of the offences with which the respondent company was charged. The case must go back to the justices with an intimation of our opinion to this effect, and for their determination on the facts.

MACNAGHTEN J. I am of the same opinion. The charge against the respondent company was that for the purposes of the Motor Fuel Rationing (No. 3) Order, it, with intent to deceive, made use of a document which was false in a material particular. That such an act should be a criminal offence, it is necessary that it should be done with an intent to deceive. Mr. Carey Evans, on behalf of the respondent company, conceded that a body corporate is a " person " to whom, among other attributes which it may possess, there should be imputed that of a mind capable of having knowledge and of forming an intention. It would, indeed, be too late in the day to suggest the contrary of those propositions. It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate. Mr. Carey Evans says that, although a body corporate may be capable of having knowledge and also of forming an intention, it cannot have a mens rea. If the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that, according to the authorities that my Lord has cited, his knowledge and intention must be imputed to the company. In my opinion, the submission made to the justices that the respondents could not in law be capable of a criminal intention cannot be sustained.

HALLETT J. I agree. Regulation 99B of the Defence (General) Regulations, 1939, makes the provisions of the Interpretation Act, 1889, applicable to the regulations, and by s. 2, sub-s. 1, of the Act : " In the construction of every enact-

"ment relating to an offence punishable on indictment or on "summary conviction, whether contained in an Act passed "before or after the commencement of this Act, the expression "'person' shall, unless the contrary intention appears, "include a body corporate." The expression "any person" in reg. 82, therefore, includes a limited liability company, such as the respondent company, unless the contrary intention appears. The argument for the respondent company, as I understand it, is that a contrary intention is to be deduced from the words "with intent to deceive" in the first part of the regulation and, perhaps, from the words "which he knows," in the second part. Inasmuch as a body corporate, being a fictitious person, can only act through a servant or agent, it can never commit a tort or a crime except through the act or omission of a servant or agent. For that reason I, personally, derive no help from such decisions as that in *Chisholm* v. *Doulton* (1), *Parker* v. *Price* (2), where the person charged was a real person, who could have been, but was not, personally guilty of the act or omission in question.

With regard to the liability of a body corporate for torts or crimes, a perusal of the cases shows, to my mind, that there has been a development in the attitude of the courts arising from the large part played in modern times by limited liability companies. At one time the existence, and later the extent and conditions of such a body's liability in tort was a matter of doubt, due partly to the theoretical difficulty of imputing wrongful acts or omissions to a fictitious person, and it required a long series of decisions to clear up the position. Similarly, the liability of a body corporate for crimes was at one time a matter of doubt, partly owing to the theoretical difficulty of imputing a criminal intention to a fictitious person and partly to technical difficulties of procedure. Procedure has received attention from the legislature, as for instance, in s. 33 of the Criminal Justice Act, 1925, and the theoretical difficulty of imputing criminal intention is no longer felt to the same extent.

In *Pharmaceutical Society* v. *London & Provincial Supply Association* (3) Lord Blackburn said: "If you could get over "the first difficulty of saying that the word 'person' here may "be construed to include an artificial person, a corporation, "I should not have the least difficulty upon those other "grounds which have been suggested." In *Reg.* v. *Tyler* (4)

(1) 22 Q. B. D. 736.

(2) (Unreported, Mar. 31, 1943.)

(3) 5 A. C. 857, 870.

(4) [1891] 2 Q. B. 588, 594, 597.

1943

DIRECTOR OF PUBLIC PROSECUTIONS v. KENT AND SUSSEX CONTRACTORS, LD.

Hallett J.

Bowen L.J. said: "I take it, therefore, to be clear that in the "ordinary case of a duty imposed by statute, if the breach of "the statute is a disobedience to the law, punishable in the case "of a private person by indictment, the offending corporation "cannot escape from the consequences which would follow "in the case of an individual by shewing that they are a "corporation." Kay L.J. said: "Therefore, that part "of the argument, that, inasmuch as a criminal act involves "a mens rea, a corporation which has no mens at all is not "subject to criminal proceedings in any case, is untenable." Applying the observations of Bowen L.J. to the present case, if every person desiring to obtain petrol coupons has a duty imposed by statutory authority to furnish honest information, it seems strange and undesirable that a body corporate desiring to obtain petrol coupons and furnishing dishonest information for that purpose should be able to escape the liability which would be incurred in like case by a private person. The decision in *Pearks, Gunston & Tee, Ld.* v. *Ward* (1) is, at least, consistent with the contrary view. In *Mousell Bros., Ld.* v. *London & North Western Railway Company* (2), ss. 98 and 99 of the Railway Clauses Consolidation Act were considered. Those sections have already been quoted by the Lord Chief Justice and I need only mention the crucial words. By s. 98, every person being the owner of goods passing on the railway must give to the collector an exact account of certain particulars. That seems to me to correspond to the requirement of the Motor Fuel Rationing Order that every person desiring to obtain coupons must give the information required by the Board of Trade. By s. 99, if any such owner gives a false account with intent to avoid payment, he is liable to a penalty. Similarly, in the present case, if any person gives false information for the purposes of the Motor Fuel Rationing Order, with intent to deceive, he is liable to a penalty. It was held in *Mousell Bros., Ld.* v. *London and North Western Railway Company* (3), that if a false account was given by a servant or agent of a company on its behalf with intent to avoid payment, that was sufficient to render the company liable to the prescribed penalty. Atkin J. said: "I see no difficulty in the fact that "an intent to avoid payment is necessary to constitute the "offence. That is an intent which the servant might well have, "inasmuch as he is the person who has to deal with the

(1) [1902] 2 K. B. 1.

(2) [1917] 2 K. B. 836, 846

(3) [1917] 2 K. B. 836.

"particular matter." Those words seem to me to be eminently applicable to the present case. In *Rex* v. *Cory Brothers* (1), Finlay J. referred to certain types of crime, in respect of which, according to old authorities by which he considered himself to be bound, a body corporate could not be held to be liable. It may be that those authorities will require reconsideration some day in the light of the development to which I have already referred, but for present purposes it is sufficient to notice that the offences now in question are of a fundamentally different character. In *Law Society* v. *United Service Bureau, Ld.* (2), Avory J. said: "It has been laid down over "and over again that where a statute absolutely prohibits the "doing of an act it is sufficient to show that the person accused "did the forbidden act intentionally and that it is not "necessary to go further and prove what is commonly known "as mens rea or any intention other than to do the thing "forbidden." Avory J. had not in that case to consider and did not decide whether the necessity of proving mens rea would prevent the conviction of a body corporate. Finally, in *Triplex Safety Glass Co., Ld.* v. *Lancegaye Safety Glass Co., Ld.* (3), du Parcq L.J. clearly took the view that a body corporate may by its servants or agents be guilty of malice so as to render it liable to a conviction for criminal libel, notwithstanding that the occasion of the publication was privileged. Such a view is obviously inconsistent with the contention on behalf of the respondent company that a state of mind cannot be attributed to a body corporate so as to render it liable to conviction of an offence in which a certain state of mind is an essential ingredient. For these reasons I agree that this appeal should be allowed.

Case remitted.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondent company: *Stephenson, Harwood & Tatham.*

(1) [1927] 1 K. B. 816.
(2) [1934] 1 K. B. 343, 349.
(3) [1939] 2 All E. R. 613.

P. B. D.

C. A.

1943

Oct. 26, 27, 28; Dec. 10.

INGALL *v.* MORAN.

Administration—Action by administrator—Writ issued by administrator before grant of letters of administration—Title of plaintiff to sue—Doctrine of relation back.

The plaintiff issued a writ in an action brought by him under the Law Reform (Miscellaneous Provisions) Act, 1934, claiming to sue in a representative capacity as administrator of his son's estate, but he did not take out letters of administration until nearly two months after the date of the writ:—

Held, that the action was incompetent at the date of its inception by the issue of the writ, and that the doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death could not be invoked so as to render the action competent.

APPEAL from Croydon county court.

On September 19, 1941, the son of the plaintiff was riding a motor cycle combination along the highway, when he was killed in an accident caused by the negligence of the defendant, a Canadian soldier, who was driving a lorry owned by the Canadian government. On September 17, 1942, the plaintiff issued the writ in the present action, as administrator of his son's estate, against the defendant, under the Law Reform (Miscellaneous Provisions) Act, 1934. The plaintiff did not take out letters of administration until November 13, 1942. The defendant contended that, as the plaintiff at the time when the writ was issued was not the administrator of his son's estate, he had no title to sue, and the action would not lie. He further contended that, even if the action was properly constituted by the grant of letters of administration in November, 1942, it was barred by s. 21, sub-s. 1, of the Limitation Act, 1939 (1). It was admitted before the county court judge that the defendant was entitled to the protection of the Public Authorities Protection Act, but the plaintiff contended that by the rules of equity when letters of administration were granted, the title of the administrator related back to the death of the intestate. The county court judge applied the doctrine of " relation back," found for the plaintiff, and awarded him 494*l*. 8*s*. 6*d*. damages. The defendant appealed.

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(1) Limitation Act, 1939, s. 21, sub-s. 1: " No action shall be " brought against any person for " any act done in pursuance, or " execution, or intended execu- " tion . . . . of any public duty " or authority, or in respect of " any neglect or default in the " execution of any such . . . . " duty or authority unless it is " commenced before the expiration " of one year from the date on which " the cause of action accrued."

Havers K.C. and *B. Reece* for the defendant. The decision of the county court judge was wrong. There is a wide distinction between the position of an executor and that of an administrator. An executor derives his title from the will of the deceased, and he is allowed to bring his action for the benefit of the estate of the deceased before the will is proved, but he must be able to produce probate of the will before judgment is given. An administrator derives his title from the grant of the letters of administration, and cannot take proceedings in the administration until he has obtained a grant. Holt C.J. said in *Martin* v. *Fuller* (1): In case of an executor, if he hath the probate at the time when he declares, it is well; but it is otherwise in the case of an administration. See also *Wankford* v. *Wankford* (2), where Powys J. said, "but an "administrator cannot act before letters of administration "granted to him." Lord Parker in delivering the advice of the Judicial Committee of the Privy Council in *Meyappa Chetty* v. *Supramanian Chetty* (3) said: "It is quite clear that "an executor derives his title and authority from the will of "his testator and not from any grant of probate. The personal "property of the testator, including all rights of action, vests "in him upon the testator's death, and the consequence is "that he can institute an action in the character of executor "before he proves the will. He cannot, it is true, obtain a "decree before probate, but this is not because his title depends "on probate, but because the production of probate is the "only way in which, by the rules of the court, he is allowed to "prove his title. An administrator, on the other hand, derives "his title solely under his grant, and cannot, therefore, institute "an action as administrator before he gets his grant. The "law on the point is well settled." Phillimore J., on this ground, set aside a judgment in *Tattersall* v. *Ashworth* (4), which had been obtained under Or. XIV on a writ issued by a person suing as administrator before grant of letters of administration, and gave unconditional leave to defend, although between the issue of the writ and the order for judgment the plaintiff had obtained the grant of administration.

(1) (1695) Comberbach's Rep. 371.

(2) (1698) 1 Salkeld 299, 301.

(3) [1916] 1 A. C. 603, 608.

(4) (1903) unreported; see Annual Practice for 1943, p. 182.

In *Creed* v. *Creed* (1) where a plaintiff had obtained a grant of administration and commenced an action as administrator, when in point of fact there was a will, it was held that the plaintiff's letters of administration were void ab initio, and that the plaintiff had no title to sue when the action was brought: see also Williams on Executors (12th ed.), vol. 1, p. 272. The estate of the deceased in the present case, including the right of action in respect of his death, was, until the grant of letters of administration, vested in the President of the Probate, Divorce and Admiralty Division of the High Court and not in the plaintiff. The writ, therefore, was issued when the plaintiff had no title and no right to sue. There is a difference in practice between the chancery and common law courts on this point. In the King's Bench Division the court will not allow an administration action to be brought until there has been a grant of letters of administration. The practice of the chancery courts cannot extend so as to deprive a defendant of a right which he possesses under a statute of limitations. [*Fell* v. *Lutwidge* (2); *Humphreys* v. *Humphreys* (3); *Horner* v. *Horner* (4); *Mabro* v. *Eagle, Star & British Dominions Insurance Co.* (5); *Evans* v. *Bagshaw* (6); *Attorney-General* v. *Corporation of Avon* (7); *Weldon* v. *Neal* (8); and *Hudson* v. *Fernyhough* (9) were also cited.]

Samuels K.C. and *Bassett* for the plaintiff. When letters of administration are granted, they relate back to the time of the death of the intestate: *Long* v. *Hebb* (10); *Anon.* (11); and, therefore, the action brought by the plaintiff as administrator was properly brought: *Fell* v. *Lutwidge* (2). In equity it is sufficient if letters of administration are obtained after the issue of the writ, but before the trial of the action, although such an action would not be good at common law. [GODDARD L.J. The writ was endorsed as being issued by the plaintiff in a representative capacity at a time when he had no representative capacity, and therefore the writ could have been struck out.] Lord Parker of Waddington said in *Meyappa Chetty* v. *Supramanian Chetty* (12): " But a cause of

(1) [1913] 1 I. R. 48.
(2) (1740) 2 Atk. 120.
(3) (1734) 3 P. Wms. 349, 351.
(4) (1853) 23 L. J. (Ch.) 10.
(5) [1932] 1 K. B. 485.
(6) (1870) L. R. 5 Ch. 340.
(7) (1863) 3 De G. J. & S. 637.
(8) (1887) 19 Q. B. D. 394.
(9) (1889) 61 L. T. 722.
(10) (1652) Styles, 341.
(11) (1697) Comberbach 451.
(12) [1916] 1 A. C. at p. 610.

C. A.

1943

INGALL
v.
MORAN.

" action does not accrue unless there be someone who can " institute the action. In the case of a cause of action arising " in favour of the estate of a deceased person at or after his " death, time will at once begin to run, if there be an executor, " even though probate has not been obtained . . . . ; but if " there be no executor time will run only from the actual grant " of letters of administration." Therefore in the present case time would not run until after the grant of the letters of administration to the plaintiff. In the Chancery Division an administrator's title is treated as relating back to the intestate's death in order to safeguard the estate against injury before the administrator's title is perfected. It is submitted that the same principle should be applied in the King's Bench Division. [*Foster* v. *Bates* (1) was also referred to.]

Cur. adv. vult.

Dec. 10. The following judgments were read.

SCOTT L.J. This remitted action was brought by a father, suing in the representative capacity of administrator to his son's estate, for damages recoverable under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of his son, age twenty, in a motor accident on September 19, 1941, by reason of the defendant's negligence. His Honour Judge Hurst gave judgment for the plaintiff for 494*l.* 8*s.* 6*d.*—as to 450*l.* for general damages for loss of expectation of life, and for the balance as special damages. Before us there was no appeal on the issue of death through the defendant's negligence, but the defence raised two pleas which were fully argued—(1.) that the action was never properly constituted in that while it purported to be a representative action by the plaintiff as administrator, by writ issued on September 17, 1942, in fact the grant of letters of administration was only on November 13 following ; and (2.), alternatively, that even if the action ever became well constituted by the grant in November, that was too late, as it was not " commenced " within the statutory period of twelve months from the accrual of the cause of action, as required by the Limitation Act, 1939, s. 21. The plaintiff sought to answer both pleas by the contention that the plaintiff's title " related back " to the death of the intestate.

Many cases were cited to us in argument, and I have read

(1) (1843) 12 M. & W. 226.

and agree with my brother Goddard's review of them, but I think a preliminary analysis of the legal questions arising for our determination may help in defining the precise relevance of those cases. The cause of action arose, and was vested in the deceased lad, at the moment when he was injured, and the measure of his damages included fair compensation for such loss of expectation of life as was caused to him by the defendant's tort. That chose in action was his. To it the common law maxim "Actio personalis moritur cum persona" would have applied on his death but for the Act of 1934 which caused it to survive. If he had left a will, it would at the moment of his death automatically have vested in his executor. As he died intestate, it vested in the President of the Probate, Divorce and Admiralty Division, and remained in him until letters of administration were issued. Then—and not before—it would automatically pass from the President to the administrator. As the writ was issued on September 17, 1942, and there was no grant till November, it follows, necessarily, that at the time of writ issued the plaintiff had no shadow of title to his son's surviving chose in action, in respect of which he purported to issue a writ, falsely (although no doubt quite innocently) alleging that he issued it as administrator. It purported to launch a representative action under Or. III, r. 4—an action in which he confessed, first, that he was not suing in his own right, and, secondly, that he had no right in that action to prosecute any claim except in his representative capacity. The defendant could have demanded production of the non-existent letters of administration, and on the plaintiff's failure to produce them the action would, on the defendant's application, automatically have been struck out. Such an action was, in my opinion, incapable of conversion by amendment into a valid action—just as much so as if he had issued a personal writ claiming to be lawfully possessed of the estate of the deceased and had subsequently asked leave to amend by substituting a representative claim. It is true that when he got his title by the grant of administration he prima facie became entitled to sue, and could then have issued a new writ, but that was all. An application by him to treat the original writ of September 17 as retrospectively valid from that date would have been refused by the court, not only because it might prejudice existing rights of defence, but because it would not be permissible under the Rules of the Supreme Court or the Judicature Acts. The old writ was, in truth, incurably a nullity. It was born dead, and could not be revived. If that conclusion is right it follows equally that the statement of claim was not delivered in any action recognized by the Rules of the Supreme Court, and all subsequent proceedings in the supposed action, including the judgment of the learned county court judge, were likewise nugatory, for, if the action and the pleadings were bad, there was no valid action before the learned judge to try and it is our duty to say so.

The plea of a statutory limitation of twelve months is really an alternative plea. If the action was never a valid action there was and could be no valid judgment in favour of the plaintiff, and the plea of the statute was superfluous. It is only if possession by the plaintiff of representative capacity at the time of delivery of the statement of claim is sufficient to satisfy the statute, that the second plea of the defendant calls for decision. On both pleas the plaintiff had to rely, by way of replication, on the doctrine of "relation back," which, it was contended, cured the invalidity which affected the plaintiff's right of action when he issued his writ, as from the moment when he became administrator, and then gave validity even to the writ, or, alternatively, if it did not cure the defect in the writ, gave validity to the action as from the date of the grant and entitled the plaintiff to say that his action was "commenced," at latest, when he delivered the statement of claim on November 18, five days after the grant of administration. I assume for this purpose that the act of negligence which caused the death was one within the category defined in s. 1 of the Public Authorities Protection Act, 1893, and s. 21, sub-s. 1, of the Limitation Act, 1939, so that, by the combined effect of the two, the action would be barred if not "commenced before the expiration of one year from the date "when the cause of action accrued"; i.e., before September 20, 1942. Whether it is open to the plaintiff, as respondent in this court, to contend that the Public Authorities Protection Act has on the facts in evidence no application, I will consider presently.

There is one small difference of language in the above mentioned two statutes which should perhaps be mentioned. While the Act of 1893 speaks of "any action, prosecution or "other proceedings," the Act of 1939 speaks only of an "action." I do not think the words "any other proceeding" can have any relevance to this appeal. We are only concerned

C. A.

1943

Ingall v. Moran.

Scott L.J.

with the barring of a right of action. The point to which I refer depends on the meaning of the word "action." The plaintiff contends that the invalidity of the writ is not fatal, as the grant of letters on November 13 saved the statement of claim from being defective as a statement of claim, but that hypothesis does not make the action valid, for, so far as the present appeal is concerned, by the definition of s. 225 of the Judicature Act, 1925, the word "action" means a civil proceeding commenced by writ. It is, therefore, just as impossible for the plaintiff to contend that he "commenced" his action when he delivered his statement of claim, as it is for him to contend that he commenced his action by a valid and effective writ. It follows that on the issue raised by each plea he is driven to the same replication, viz., the doctrine of "relation "back," but, in my opinion, that doctrine does not help him on either plea. If the writ was bad when issued, the action was never commenced. The learned judge was in error in speaking of the issue of the writ as being a question of fact and not law, and no doctrine of relation back could give reality to a statement of claim not preceded by a duly issued writ. Finally, once September 19, 1942, had passed without a writ duly issued by a duly qualified administrator, the cause of action was barred, and could not be resurrected. The words of Scrutton L.J., in *Mabro* v. *Eagle, &c., Co.* (1), are directly in point: "In my experience the court has always refused to "allow a party or a cause of action to be added where, if it "were allowed, the defence of the Statute of Limitations would "be defeated. The court has never treated it as just to deprive "a defendant of a legal defence. If the facts show either "that the particular plaintiff or the new cause of action "sought to be added are barred, I am unable to understand "how it is possible for the court to disregard the statute." The plaintiff there, in answer to a plea of the Statute of Limitation, sought to add an administrator as plaintiff after the statutory time had run out.

On the doctrine of "relation back" and its origin in equity, I have nothing to add to the judgment of Luxmoore L.J., which explains the true position with such admirable clearness. It follows that the doctrine has no application in the present appeal. A faint attempt was made before us, on behalf of the plaintiff, to raise a contention which had been expressly disclaimed in the court below. It was that the Act had no application because the driver of the lorry which caused the death was in the employ of the Canadian government, and that government was not a " public authority" within the British Act. It would be wrong to allow such a point to be taken for the first time in the Court of Appeal, especially after it had been expressly conceded below that the Act did apply. I express no opinion on the point. The appeal must be allowed, the judgment below set aside with costs here and below, the latter on scale " C."

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(1) [1932] 1. K. B. at p. 487.

LUXMOORE L.J. [after stating the facts]. Apart from the denial of negligence the defendant alleged that the plaintiff's claim was barred by s. 21, sub-s. 1, of the Limitation Act, 1939. At the trial it was conceded on behalf of the plaintiff that the section referred to applied because the defendant was driving his lorry in pursuance of a public duty. There was no argument on this point, either in the court below or in this court, and I therefore proceed on the footing that the concession was rightly made. The effect of the statutory provisions referred to, so far as they affect the present case, is that no action can lie " unless it is commenced " within twelve months next after September 19, 1941, i.e., before September 20, 1942. On behalf of the plaintiff it was urged that, although he was not, in fact, the administrator of the deceased's estate when the writ was issued, the subsequent grant perfected the plaintiff's title and related back to the death of the deceased. The judge below accepted this argument, and upheld the plaintiff's claim, and, consequently, rejected the defendant's contention that the action was incompetent and the claim statute barred.

The defendant has appealed to this court, and the only question arising in the appeal is whether the doctrine of relation back, which is well established in respect of an administrator's title to a deceased's estate, has any application to the status of a plaintiff who can only sue in a representative capacity in an action started before the grant of letters of administration. It is, I think, well established that an executor can institute an action before probate of his testator's will is granted, and that, so long as probate is granted before the hearing of the action, the action is well constituted, although it may in some cases be stayed until the plaintiff has obtained his grant. The reason is plain. The executor derives his legal title to sue from his testator's will. The grant of probate before the hearing is necessary only because it is the only method recognized by the rules of court by which the executor can prove the fact that he is the executor. If any authority for this is required it is to be found in the judgment of Lord Parker in *Chetty* v. *Chetty* (1). An administrator is, of course, in a different position, for his title to sue depends solely on the grant of administration. It is true that, when a grant of administration is made, the intestate's estate, including all choses in action, vests in the person to whom the grant is made, and the title thereto then relates back to the date of the intestate's death, but there is no doubt that both at common law and in equity, in order to maintain an action the plaintiff must have a cause of action vested in him at the date of the issue of the writ. Lord Parker, in the case to which I have already referred, states this to be the law in the plainest terms. The defendant in the court below referred to an unreported case (*Tattersall* v. *Ashworth*) (2) heard by Phillimore J. in King's Bench chambers, which is cited in the Annual Practice for 1943, at page 182, and also in the Yearly Practice for 1940, at page 14. The relevant passage in the Annual Practice is as follows: "An executor is entitled to sue in the High "Court before obtaining probate, he being named in the "will as executor, and the grant of probate being only a com-"pletion of his title. But an administrator is not entitled "to sue in King's Bench Division until administration is "granted, for until such grant there is no certainty that there "is an intestacy, nor that if there is an intestacy any "particular person will be administrator. On this ground "judgment under Or. 14 on a writ issued by a person suing "as administrator before grant of letters of administration, "was set aside with costs, and unconditional leave to defend "given; although between the issue of the writ and the order "for judgment the Plaintiff had obtained the grant of "administration (*Tattersall* v. *Ashworth* (unreported), "Phillimore J., in chambers, July 2, 1903). In Chancery "Division an administrator may sue before grant of adminis-"tration, provided that letters of administration are produced "at the hearing." A statement to the same effect appears in the Yearly Practice, but there a doubt is raised whether an administrator is not now entitled to sue before grant, even in the King's Bench Division, since the abolition of profert and oyer.

(1) [1916] 1 A. C. 603.

(2) (1903) unreported,

C. A.
1943
INGALL
v.
MORAN.
Luxmoore L.J.

In my judgment, these statements are incorrect. It is true that a person who ultimately becomes an administrator may start proceedings in the Chancery Division for the protection of an intestate's estate, and can obtain in a proper case interim relief by the appointment of a receiver pendente grant, but in all such cases the person who institutes such proceedings has a beneficial interest in the intestate's estate, for he would not obtain a grant unless he had such an interest either as heir at law or as one of the next of kin or as a creditor. In such cases the well recognized practice in the Chancery Division is to endorse the writ in the first instance for the only relief then obtainable, namely, the appointment of a receiver pendente grant, and to apply to amend the writ after the grant has been obtained, if further relief is required, by adding a claim for administration of the estate with or without specific directions with regard to any special relief required. A study of the cases referred to in the argument, and relied on in support of the supposed difference between the common law and chancery practice, makes this position clear. I need not refer to them in detail, because my brother Goddard has dealt with them in the judgment he is about to deliver, which I have had the opportunity of reading and with which I am in entire agreement. I have no doubt that the plaintiff's action was incompetent at the date when the writ was issued, and that the doctrine of the relation back of an administrator's title to his intestate's property to the date of the intestate's death when the grant has been obtained cannot be invoked so as to render an action competent which was incompetent when the writ was issued. In my judgment, the learned judge was wrong in coming to the contrary conclusion. It follows that no proper action was commenced before the statutory period of limitation expired. That period expired before any grant of administration was obtained, and the right of action was lost to the intestate's estate. Although I cannot help feeling some regret I have no doubt but that the appeal must be allowed and the action dismissed.

GODDARD L.J. This action was brought under the Law Reform Act, 1934, to recover damages for the loss of expectation of life of one Alfred Kenneth Ingall deceased, and for his funeral expenses and damage to his motor cycle. The plaintiff in the writ described himself as the administrator of the estate of the deceased, though, in fact, he had not at the time the writ was issued obtained letters of administration, though he had done so by the time the statement of claim was delivered. The question is whether he was entitled to sue when he did. If he was not, it follows that the action is bad as being brought by a person who had no title to sue, and no other question will arise.

There is no doubt that where a deceased person leaves a will and therein names an executor the latter can institute actions before obtaining probate, though the actions may be stayed until the probate is granted: *Tarn* v. *Commercial Bank of Sydney* (1). The reason for this is, no doubt, that the executor's title is derived from the will which operates from the death of the testator, and all he has to do is to prove the will, that is, to prove that the will which names him as executor is the last will of the deceased. He has a title to sue, but the court requires him to perfect his title and will not allow the action to proceed till this has been done. The action will be stayed, but not dismissed. An administrator is in a different position. An intestate's property, including choses in action, formerly vested on death in the ordinary, and now, by virtue of the Administration of Estates Act, which in this respect re-enacts earlier statutes, vests in the President of the Probate Division till he grants letters of administration to someone. The difference in the position of an executor and administrator in this respect was authoritatively stated by Lord Parker in delivering the advice of the Judicial Committee in *Chetty* v. *Chetty* (2). He said: "It is quite clear that an executor "derives his title and authority from the will of his "testator and not from any grant of probate. The personal "property of the testator, including all rights of actions, "vests in him upon the testator's death, and the conse"quence is that he can institute an action in the character "of executor before he proves the will. He cannot, it is true, "obtain a decree before probate, but this is not because his "title depends on probate, but because the production of "probate is the only way in which, by the Rules of the Court, "he is allowed to prove his title. An administrator, on the "other hand, derives title solely under his grant, and cannot, "therefore, institute an action as administrator before he gets "his grant. The law on the point is well settled: see Comyn's "Digest, Administration, B. 9 and 10; *Thompson* v.

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(1) (1884) 12 Q. B. D. 294.

(2) [1916] 1 A. C. 603, 608.

"*Reynolds* (1); *Woolley* v. *Clark* (2)." The other members of the board were Lord Loreburn, Lord Atkinson and Lord Sumner, and, though not technically binding on this court, it is impossible to treat a pronouncement of such high authority as otherwise than conclusive of the point. This case was not cited to the learned county court judge, who, in a careful and well reasoned judgment, came to the conclusion that, though an administrator could not sue at law before a grant of letters he could do so in equity, and that, if there were a conflict between law and equity, the latter must prevail. The only authority cited to him was the unreported case of *Tattersall* v. *Ashworth* (3), cited both in the Annual and the Yearly Practice. In the former book the citation is on p. 182 of the 1943 edition, where it is stated that Phillimore J. in chambers set aside a judgment obtained at the suit of a person suing as administrator to whom letters had not been granted at the date of the writ, but who had obtained a grant before judgment. There it is stated that in the Chancery Division an administrator may sue before grant of administration, provided that the letters are produced at the hearing, and reference is made to Daniell's Chancery Practice, 8th ed., p. 352. To the same effect is the note in the Yearly Practice which considers *Tattersall* v. *Ashworth* (3) to be of doubtful authority. In my opinion, the decision of Phillimore J. was right, and the statement as to what may be done in the Chancery Division is too wide. It is enough to refer to the cases which are cited in Daniell's Chancery Practice as authority for the proposition stated—*Fell* v. *Lutwidge* (4); *Humphreys* v. *Humphreys* (5), and *Horne* v. *Horne* (6). All these cases were administration suits or suits relating to the administration of estates. They show that actions brought by persons who would be beneficiaries in the administration are not defeated, either where the person entitled to obtain letters is plaintiff or where such a person is made a defendant, because a grant has not been made at the date of the writ. The action is brought to protect the estate. The modern practice would be to issue a writ asking for the appointment of a receiver pending a grant of letters, and, if brought by a person who would be a beneficiary in the administration, there would be no objection to the action because the person entitled to take out letters is and must be made a defendant though the grant has not yet been made. It is true that in *Fell* v. *Lutwidge* (1), Lord Hardwicke, then Lord Chancellor, but who had also been Lord Chief Justice of the King's Bench, gave as a reason for an action at law not being maintainable by a person who was merely entitled to administration, that he would have to make profert of the letters and that was not required in a court of equity, but I do not think he meant to lay down that in any chancery suit it was open to a person to file a bill as administrator before he obtained a grant, and if he did it is contrary to the later authorities. *Evans* v. *Bagshawe* (2); *Attorney-General* v. *Corporation of Avon* (3), both suits in equity, are directly in point, but it is unnecessary to go through the many cases cited in argument because, in my opinion, it is the plain duty of this court to follow *Chetty* v. *Chetty* (4), and that is conclusive on this point.

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(1) (1827) 3 C. & P. 123.
(2) (1822) 5 B. & Ald. 744.
(3) Unreported.
(4) 2 Atk. 120; Barn. C. 320.
(5) 3 P. Wms. 351.
(6) 23 L. J. (Ch.) 10.

The cases mentioned in Daniell are not an exception to this rule of law. They are cases in which letters were not necessary for a plaintiff to establish his title to sue or in which the absence of letters did not afford a defence to a defendant. Nor is it necessary to consider the many cases which show that once letters are granted the title of the administrator relates back to the death. They have no application to this question. All they show is that, once letters have been obtained, the title relates back so that the administrator may sue in respect of matters which have arisen between the date of the death and the date of the grant, just as he may sue in respect of a cause of action that had accrued to the intestate before his death, provided the cause of action survives. The result is that this action was, and always remained, incompetent, and judgment ought to have been entered for the defendant. I desire to say that it was, in my opinion, entirely wrong to have described the plaintiff in the writ as the administrator. Whether it misled the defendants I do not know, though I gather from the fact that in the defence all that is said is that the grant of the administration is not admitted that it may well be that it was not till a later stage that it came to their knowledge that the plaintiff was not an administrator. Such a description cannot be justified on the ground that the plaintiff hoped and expected and had every reason to believe that he would become the administrator. Had the writ described him as the person entitled to letters of administration the question might have been raised at a very early stage, by an application to dismiss the action, and a good deal of expense might have been saved. On the other hand, if the proper description had been given and the defendants had taken no action in respect of it till the trial, their failure to do so might well have influenced the question of costs as they lost on the issue of negligence. The appeal should, in my opinion, be allowed with costs, and judgment entered for the defendant in the court below, with costs.

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(1) 2 Atk. 120; Barn. C. 320.

(2) L. R. 5 Ch. 340.

(3) 3 De G. J. & S. 637

(4) [1916] 1 A. C. 603.

Appeal allowed.

Solicitors for defendant: *L. Bingham & Co.*
Solicitors for plaintiff: *W. C. Crocker.*

A. W. G.

In re DECISION OF WALKER.

APPEAL OF W. S. LEWIS AND OTHERS.

1943
Dec. 2, 3, 9.

Local Government—Remuneration of officers—"Reasonable remuneration"—Allowances for children—Legality—Local Government Act, 1933 (23 & 24 *Geo.* 5, *c.* 51), *s.* 106, *sub-s.* 2.

Following meetings between the representatives of the non-manual staff of the Birmingham City Council and representatives of the council, at which were discussed proposals for increasing the salaries and remuneration of the staff to meet the increased cost of living due to the war, the council adopted a recommendation by its salaries, wages and labour committee to increase generally the existing war bonus and also, in the case of married men, widowers and widows, to pay an allowance of 2*s.* 6*d.* per week for each child under fourteen years of age, or under eighteen if undergoing full-time education. The district auditor of the Ministry of Health disallowed the payments for children's allowances and surcharged certain members of the council, on the ground that the allowances had no relation to the services rendered to the council by the recipients, and were therefore contrary to law. On a motion to quash the decision of the district auditor:—

Held, that the allowances were paid as part of the consideration for services rendered; that the allowances having been given by the council as part of a settlement of a request by the staff for a

1943

Decision of Walker, *In re.*

Appeal of W. S. Lewis.

revised scale of salaries to bring the remuneration of the staff more into harmony with the increased cost of living due to the war, there was nothing illegal or unreasonable in basing the increase on the needs and circumstances of particular officers; and that a very wide discretion having been given to the council by s. 106 of the Local Government Act, 1933, in the absence of bad faith or unreasonableness in the amounts paid the court had no power to override the reasonable exercise of that discretion by the council.

Motion to quash decision of district auditor.

At meetings between the representatives of the non-manual staff of the Birmingham City Council and representatives of the council, proposals were put forward by the former for a revision of salaries to meet the increased cost of living caused by the war. In due course the salaries, wages and labour committee recommended to the council an increased scale of war bonuses for the permanent non-manual staffs, plus, in the case of married men, widowers and widows, an allowance of 6*l.* 10*s.* per annum, or 2*s.* 6*d.* per week, for each child under fourteen years of age or under eighteen years if still undergoing full-time education. On October 14, 1941, the council approved the report of the committee, and on December 2 of the same year, by resolution, extended the children's allowance to their temporary staff after three months' service. The district auditor of the Ministry of Health disallowed the payments for children's allowances, and, by arrangement, surcharged the Lord Mayor, Mr. W. S. Lewis, and two other members of the council, jointly and severally, in the sum of 48*l.* 13*s.* 8*d.* The grounds of his decision were that the payments were not salary or remuneration within the meaning of the Local Government Act, 1933, and had no relation to the value of the services rendered to the council by the particular officers; and that the council in exercising its discretion had unlawfully taken into consideration extraneous matters.

The applicants asked that the disallowances and surcharges should be quashed, or, alternatively, for a declaration that they had acted reasonably and should be relieved from personal liability.

Fitzgerald K.C. and *Neep* for the Birmingham Corporation. The motion should be allowed and the surcharges quashed. The council desire to retain a contented and efficient staff. They have taken infinite pains to ascertain what other large employers are doing, and as a result have exercised their discretion, in a lawful manner, under the powers conferred by s. 55 of the Rating and Valuation Act, 1925; s. 148 (1.) of the Education Act, 1921; and para. 157 of the Public Assistance Order, 1930, No. 185, which are repeated in effect in s. 106 of the Local Government Act, 1933. The courts will not interfere where a public authority exercises its discretion in a perfectly fair and reasonable manner according to law. In *Short* v. *Poole Corporation* (1), Pollock M.R. said: " Where a discretion " is given to the local authority, it is for that authority to " exercise it, provided that its action is not ultra vires, nor its " powers exercised corruptly or mala fide. Where the exercise " of the discretion is challenged, it is for the plaintiff to prove " that there is a duty in the courts to interfere upon the grounds " already stated. . . . . So long as the discretion has been " exercised and the limits of discretion are not passed, the " decision rests with the local authority." The observations of Lord Wrenbury in the Poplar case of *Roberts* v. *Hopwood* (2), on which the district auditor relied, lend no support to any general principle that a form of wages of which some part takes the character of allowances for children is ultra vires. The district auditor apparently disallowed the payments on the ground that they had no relation to the services rendered by the officers, but such variations in the rates of pay occur throughout local government services; e.g., where officers are doing exactly the same work and some receive higher pay because of longer service. [*Kruse* v. *Johnson* (3) was also referred to.]

Turner K.C. and *Simes* for the district auditor. These payments which have been surcharged are not remuneration at all, and therefore do not come within the statutory power of the local authority to pay. They have no relation to the services rendered by the officers and even if remuneration are not reasonable remuneration, because the corporation have unlawfully considered an extraneous circumstance in arriving at the amount. It is immaterial that the payments were made, and are acknowledged to be made, in good faith. These payments are not wages at all, but are payments made without consideration. " Remuneration " is the price paid for services rendered. Where the cost of living rises, owing to war conditions, everybody is affected, and that fact must

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(1) [1926] 1 Ch. 66, 88.

(2) [1925] A. C. 578, 612.

(3) [1898] 2 Q. B. 91.

1943

DECISION OF WALKER, *In re.*

APPEAL OF W. S. LEWIS.

have relation to the market price of labour, but increases which are peculiar to individuals are outside considerations as to the market price of labour. There are no special circumstances in Birmingham which make it necessary, in order to retain a contented staff, for the corporation to make payments which are not made by the great majority of local authorities. The test is whether you can obtain an equally efficient servant without the extra payment. If you can, then the extra payment would be not remuneration but what was described by Bankes L.J. in the Poplar case (1) as "a gift." Allowances for children, being unlawful in themselves, cannot be rendered lawful by linking them up with war bonus or salary. [*Roberts* v. *Hopwood* (2) and *National Association of Local Government Officers* v. *Bolton Corporation* (3) were referred to.]

Fitzgerald K.C., in reply, referred to *Wimbledon and Putney Commons Conservators* v. *Tuely* (4).

Cur. adv. vult.

December 9. The following judgments were read.

VISCOUNT CALDECOTE C.J. This motion comes before the court under the provisions of s. 229 of the Local Government Act, 1933. The respondent is a district auditor appointed under the Act by the Minister of Health, and assigned as district auditor of No. 4 district. It is part of his duty to audit the rating, education and public assistance accounts of the council of the corporation of the City of Birmingham. In the course of this duty he has disallowed certain items of account, on the ground that they are contrary to law, and has surcharged the amount of the disallowed items upon the three applicants, as the persons responsible for incurring or authorizing the expenditure (see s. 228, sub-s. (1.) (*b*)). These three applicants are members of the city council, and it was agreed by them, at an interview which they had with the auditor, that they should be the persons surcharged with a view to an appeal to the High Court against the auditor's decision, as provided by s. 229 of the Local Government Act.

The material facts are set out in affidavits sworn by the auditor and the three applicants respectively. Put shortly, these facts are that the non-manual employees of the corporation

(1) [1924] 2 K. B. 695, 710.
(2) [1925] A. C. 578.
(3) [1943] A. C. 166.
(4) [1931] 1 Ch. 190.

had, by their representatives, put forward proposals for an increased cost of living bonus to be paid in addition to their basic salaries. After making inquiry as to the practice of large scale employers within the city, and as to schemes in force under other public authorities, the council approved a scheme for the payment of a fixed weekly rate of war bonus, according to age or sex, to which was added, in the case of married men, widowers or widows who received salaries not exceeding 550*l.* per annum, an amount of 2*s.* 6*d.* a week, payable in respect of each child under fourteen years of age, or under eighteen if undergoing full-time education. These last mentioned payments were called " children's allowances," and were so referred to throughout these proceedings.

Upon auditing the accounts the auditor gave informal intimation to the council of his intention to question the children's allowances, having found, to use his words, " that " the children's allowances had no relation to the services " rendered by the recipients thereof, but were grants or gifts " made to such recipients, dependent upon factors other than " the rendering of services." Thereupon the interview to which I have referred took place , and eventually the auditor, by certificate, dated April 16, 1943, disallowed sums amounting to 48*l.* 13*s.* 8*d.*, being the amount of children's allowances in certain selected areas, on the ground that they were not salary or remuneration within the meaning of all or any of the relevant statutes, or of the relevant orders, and that they were gratuities which the corporation had no statutory power to pay. He was of opinion that the classes of expenditure in question were contrary to law. In his certificate he also held that even if the sums in question could be held to be salary or remuneration, they were unreasonable, whereas salaries paid by a local authority must be reasonable. As to his last finding, no question of amount was raised in the appeal. It was common ground that the children's allowances were, as a whole, either lawful or unlawful. The applicants now move, in the first place, to quash the disallowance of these items and the consequent surcharge. They also ask for a declaration under s. 230 of the Local Government Act.

The departments of the corporation involved in this appeal are the rating, the education and the public assistance departments.

[His Lordship then read s. 55 of the Rating & Valuation Act, 1925, s. 148, sub-s. (1.), of the Education Act, 1921, and para. 157

of the Public Assistance Order, 1930, which empower local authorities to appoint and remunerate their officers and servants, and continued :] The slightly differing terms of these enactments make no difference to their meaning and effect. It was, indeed, conceded in argument, and I think rightly conceded, by counsel for the auditor, that the material provision for our consideration is s. 106 of the Local Government Act, 1933. That section provides as follows : " The " council of every borough shall appoint fit persons to be town " clerk, treasurer, surveyor, medical officer of health and " sanitary inspector or inspectors, and shall also appoint such " other officers as the council think necessary for the efficient " discharge of the functions of the council. (2.) Subject, as " respects the offices of medical officer of health and sanitary " inspector, to the provisions of this Part of this Act, the council " may pay to an officer appointed under this section such " reasonable remuneration as they may determine." The council is thus given a wide but not unlimited discretion as to the amount of salaries or remuneration which they may pay to their employees. That discretion must be exercised reasonably, but there is nothing in the words of the section to show that the powers of the council, within proper limits, are to be shared with or controlled by the auditor, still less that the court is put in a position to override the discretion of the council, once it has been exercised within the limits permitted by law. The question in this case is whether the council has acted within the powers entrusted to them by Parliament. A council might act in bad faith, but nothing of that kind is alleged here ; again, a council might adopt such a scale of salaries or wages as to make the amounts so unreasonable as to be unlawful. No such suggestion was made to us by the auditor. His disallowance of the items in question is based on a different and more fundamental ground : he is impressed by the fact that two employees may, and as he shows by examples in fact do, receive different salaries or remuneration (and hereafter I will only use one word " salaries " to cover both), although the services they render to the corporation are precisely similar, and of the same value. The discrimination, it is said by the auditor, is due not to the different values of their services but to the fact that one has a child or children and the other has not. " It follows," the auditor says in a statement of his reasons for disallowance and surcharge, " that the remuneration for the " service rendered is the amount of the basic rate of salary, "plus the appropriate basic war bonus, because this is the "rate paid to a childless officer in his grade." That contention was repeated by counsel for the auditor in answer to the applicants' submission that they had acted in good faith within their powers. Children's allowances, it was said, are not remuneration or salaries; the amounts payable by way of children's allowances have indeed no relation to the value of the service and are unreasonable; and therefore unlawful, because in making them the council had regard to extraneous matters. In support of this contention the auditor relied mainly upon extracts from opinions given in the House of Lords in *Roberts* v. *Hopwood* (1), commonly known as the Poplar case. The headnote of the report, I think, accurately states the effect of the decision. It is: "Held, (1.) that the discretion conferred "upon the council by the statute must be exercised reasonably, "and that the fixing by the council of an arbitrary sum for "wages without regard to existing labour conditions was not "an exercise of that discretion; (2.) that an expenditure upon "a lawful object might be so excessive as to be unlawful, "and that to the extent by which the amount exceeded legality "the auditor was bound to disallow it and surcharge the excess "upon the persons responsible." The passage to which the auditor attached most importance is to be found in Lord Wrenbury's opinion (1): "Wages are the pecuniary return for "services rendered. To determine the proper or true amount "which in a given state of facts has been paid or is payable for "services rendered is far from easy. It can never be determined with exactness. It is impossible to name in any "particular case an amount which if diminished by 1*s*. a week "would be too small, and if increased by 1*s*. a week would be "too large. But it is possible to name an amount which would "certainly be too large—as, for instance, if a charwoman were "paid 2*l*. a day. Using my best endeavour to state the matter "in general terms, I express it thus:—Wages in a particular "service are such sum as a reasonable person, guiding himself "by an investigation of the current rate in fact found to be "paid in the particular industry, and acting upon the principle "that efficient service is better commanded by paying an "efficient wage, would find to be the proper sum. The figure "to be sought is not the lowest figure at which the service "could be obtained, nor is it the highest figure which a generous "employer might, upon grounds of philanthropy or generosity,

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(1) [1925] A. C. 578, 612.

1943

DECISION OF WALKER, *In re.* APPEAL OF W. S. LEWIS.

Viscount Caldecote C.J.

"pay out of his own pocket. It is a figure which is not to be "based upon or increased by motives of philanthropy nor even "of generosity stripped of commercial considerations. It is "such figure as is the reasonable pecuniary equivalent of the "service rendered. Anything beyond this is not wages. It "is an addition to wages, and is a gratuity. The authority is "to pay not such sum but such wages as they think fit."

What had happened in the Poplar case was that the borough council had paid to its lowest grade of workers, men and women, a minimum wage of 4*l*. per week, that being in the judgment of the council the lowest wage a local authority ought, as a model employer, to pay for adult labour. The district auditor in arriving at a figure beyond which he thought it would be illegal to go took the pre-war rate, increased it by the cost of living, and added 1*l*. by way of margin. Above that he disallowed the payments. The disallowance, which was upheld in the House of Lords, was based upon the mere amount which he thought was excessive and unjustifiable. There was an upward limit in fixing wages, and everything above that limit was illegal simply because it was excessive. Lord Buckmaster pointed out the difficulty there was in drawing a line, but said that the line had to be drawn somewhere. The borough council had not, he thought, based their decision "upon the ground that "the reward for work is the value of the work reasonably and "even generously measured, but they took an arbitrary "principle and fixed an arbitrary sum which was not a real "exercise of the discretion imposed upon them by the "statute." (1)

In the present case the council exercised their powers, coupled as they were with a duty to the ratepayers, with a great deal of care. The appropriate committees made inquiries to inform themselves about the practice of other large employers. There was no desire on their part to be pioneers or model employers. They seem to me to have recognized that they were entrusted with a discretion which must be exercised reasonably and in the interest of the ratepayers. The council were manifestly, in my opinion, anxious to apply their minds to the facts with which they were faced. The non-manual employees had asked for an increase in their salaries to meet a rise in the cost of living. In the course of the negotiations the staff representatives put foward a scheme which would provide for a smaller addition to the cost of living bonus, on the

(1) [1925] A. C., at page 590.

1943

DECISION OF WALKER, *In re.*

APPEAL OF W. S. LEWIS.

Viscount Caldecote C.J.

condition that children's allowances were included in the scheme. It is true that nothing was said on the staff side to suggest that if their suggestions were not accepted they would resign their positions. In fact the children's allowance scheme would result in a lower expenditure than a flat rate addition to the cost of living bonus. But I cannot think that the council were only empowered to grant additions to salaries in response to a threat to strike or to resign. Yet something very like such a proposition seems to me to be involved in the argument for the auditor.

The fact that the plan ultimately approved by the council was cheaper than another proposal which the staff representatives were prepared to accept, does not seem to me to be of much importance. No question of amount arises here. The attack made on the children's allowances was that they are wholly wrong in principle as not being, in Lord Wrenbury's words, a " pecuniary return for services rendered." I do not think it is possible to accept that view. These payments to particular employees were part of what was their reward for the services they rendered. The fact that one got more than another though each gave the same service is not on the facts of this case indicative of illegality.

The so-called children's allowances are additions, in each particular case in which they are given, to the basic salary and cost of living bonus, though this part of the salary is calculated by reference to the needs and circumstances of each employee. Collective bargaining does not, in my opinion, exclude the consideration of personal or individual circumstances. If, in order to obtain an efficient and satisfied servant, the corporation thought it right to pay him an amount based in part on his expenses, I can see nothing illegal or unreasonable. It goes without saying, after the Poplar case, that the amount might be so unreasonable, that is to say, so excessive, as to be illegal. Once it is admitted, as it is here, that no objection can be made to the mere amount, I think the objections made by the auditor are bound to fail. To describe the payments as " a gratuity, and therefore unlawful," as the auditor does, is, with all respect to him, to beg the whole question. They were asked for and given as part of a settlement of a request for a revised scale of salaries, and were clearly intended, in good faith, to be paid as part of the consideration for services rendered. On these grounds I am of opinion that the applicants should succeed in their appeals, and the auditor's disallowance and surcharge should be quashed.

In these circumstances the question of a declaration under s. 230 of the Act does not arise. If my opinion on the main question had been in favour of the view taken by the auditor, I should have thought it right to make the declaration asked for, and indeed counsel for the auditor took no objection to such a declaration.

ATKINSON J. The Birmingham Corporation saw fit to remunerate, in part, certain of their non-manual servants during the year commencing October 1, 1941, by a war bonus, the amount of which depended in part on the age of the servant and in part on whether the servant had children. It included 2*s.* 6*d.* per week for each child. The auditor claimed that that part of the war bonus, the payment of which depended upon the fact of the receipient having a child or children, was beyond the statutory powers of the corporation to grant, and ought to be disallowed. He has, in fact, disallowed certain payments, amounting to 48*l.* 13*s.* 8*d.*, in the hope, I gather, of the council getting the view of this court upon the legality of the payments, and he has surcharged them upon certain members of the council. Shortly stated, his contention is that the corporation have power to remunerate only for services rendered, and that the amount paid for children's allowances has no relation to the services rendered by the servants and, therefore, is not, and cannot be regarded as, remuneration, but in truth is a gratuity and therefore unlawful.

Whether the remuneration is payable under the Rating and Valuation Act, 1925, or the Education Act, 1921, or the Public Assistance Order, 1930, or s. 106 of the Local Government Act, 1933, seems immaterial. The power is to pay such reasonable remuneration, whether salary, wages or emoluments, as the council may determine. (See *The National Association of Local Government Officers* v. *The Bolton Corporation* (1)). It was not suggested, at any rate in argument here, that there is anything unreasonable in the total amounts paid. It is not the amount which is criticized, but the nature of, and cause for, the payments. On the other hand, the council contend that the payments challenged were strictly remuneration for services rendered, and were paid as a result of negotiation to determine to what extent and in what manner the remuneration payable to servants of the corporation should be brought up to pre-war value.

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(1) [1943] A. C. 166, 178.

The question whether children's allowances are properly payable as remuneration seems to me to depend on the facts. Let me give two illustrations which, I imagine, could not be open to challenge: If a corporation, being disturbed at the declining birth-rate, passed a resolution declaring that they would pay every servant a bonus of 2*s.* 6*d.* per week for every child born twelve months after the date of the resolution, I think the auditor would have very good ground for disallowing such a bonus. It would have no relation to services rendered. On the other hand, if a servant says to the council: "The salary "you are paying me is worth only two-thirds of what it was in "pre-war days, I am expecting a child, and I cannot stay with "you unless you will agree to pay me 10*l.* a year more if, and "when, the child comes, and a further 10*l.* a year for each and "every child I might have in future"—if those are the only terms upon which the corporation can keep men they want it would be impossible to contend that the 10*l.* increase per child was not remuneration for services rendered.

The facts here were as follows:—By July, 1941, the cost of living had risen to a very material extent, or putting it in another way, the pound would not buy as much as in pre-war days, and therefore was of less value than it had been. The result was that the members of the staff of the city council found that the remuneration for their services was of considerably less value than it had been, although their services were of no less value. The problem of how that remuneration was to be brought more in harmony with the value of their services was discussed by a joint committee of staff and council representatives. The staff representatives said, in effect, that while they thought that everyone was entitled to an increase of pay during the period of depreciated currency, the members who were worst hit by the reduced value of their remuneration, and who had therefore the greatest claim to an increase of remuneration, were those with children. The single man had only to face the increased cost of feeding, housing and clothing one individual; the father of a family had to face the increased cost of feeding, housing and clothing several individuals. Their attitude was this: we men without children do not ask that our remuneration should be brought more nearly up to pre-war value than to a slight extent, but we join with fathers of families—whose ranks they probably looked forward to joining—in asking that their remuneration should in some way be brought more nearly in harmony with its pre-war value. The way suggested was an allowance for each child. The proposal was considered by the council representatives. They went into it carefully; they made many inquiries as to the practice of other large scale employers; and they were satisfied that an all-round advance could not be resisted, and that the proposal for children's allowances would cost the council less than an all-round increase of the same amount. The joint committee recommended the salaries, wages and labour committee to adopt the proposal. That committee considered the matter and recommended the council to adopt it, which in the end they did. The result was that men between twenty-one and twenty-four got a further increase of only 2*s*. 6*d*. per week, men over twenty-four got 4*s*. 3*d*. or approximately 11*l*. a year, and men with children got a further weekly allowance of 2*s*. 6*d*. per child. There was already in existence a war bonus. These further payments brought the total war bonus for men between twenty-one and twenty-four up to 21*l*. 10*s*. a year, men over twenty-four to 26*l*. a year, the men with one child 32*l*. 10*s*. a year, and with two children 39*l*., and so on. Mr. Smallman's salary and Mr. Wilkes' salary were especially mentioned by the auditor. Mr. Smallman's salary of 450*l*. became 481*l*. 19*s*. 8*d*. He got an addition of 31*l*. 19*s*. 8*d*., and Mr. Wilkes got 20*l*. 10*s*. Mr. Wilkes' 20*l*. 10*s*. was made up simply of the old basic war bonus, plus the new basic war bonus. Mr. Smallman's pay consisted of those two war bonuses, plus payment for his two children. With an increase in the cost of living of 29 per cent. it cannot, of course, be said that 481*l*. 19*s*. 8*d*. in 1941-42 was worth as much as 450*l*. in pre-war days.

Roberts v. *Hopwood* (1) has been referred to for the principles which ought to guide a local authority in determining what salaries or wages they can pay. The House of Lords was there dealing with an extreme case. A pre-war wage of 23*s*. 6*d*. was deemed equivalent to 43*s*., with the cost of living 82 per cent. over that of 1914, but the council had paid a sum of 4*l*. all round, and the auditor, in considering that figure, accepted the 43*s*., plus 1*l*. by way of margin, and disallowed anything paid over that amount. Lord Buckmaster said that the general rule applicable is that the council should pay such wages as they might think fit, the discretion as to the reasonable nature—and I stress that word—of the wages being with them; that their

(1) [1925] A. C. 578.

1943

DECISION OF WALKER, *In re.* APPEAL OF W. S. LEWIS.

Atkinson J.

discretion was a very wide one and the court ought to show great reluctance before they attempted to determine how the discretion should be exercised; but he added that there must be a real exercise of the discretion imposed upon the council in determining the value of the work, reasonably and even generously measured. Further, he made it clear that the purchasing power of the sums paid was a relevant factor to be considered. Lord Atkinson put that point in these words: "It is but right and natural that the rate of wages should rise "if the cost of living rises, because this tends directly to keep "the purchasing power of the labourer's wage at what it was "before the cost of living increased." (1). He went on to approve what Bankes L.J. had said, that payments ought not to be far in excess of those necessary to obtain the services required, and that such excess is in reality a gift, in addition to remuneration for services. He further added something which is rather relevant, I think, to this case, i.e., that justice and common sense demanded that they should take into consideration external methods of fixing wages, whether by trade union rates, cost of living, payments of other local or national authorities, or otherwise, and that they would fail in their duty if they put aside all these aids to the ascertainment of what was just and reasonable remuneration, and allowed themselves to be guided by some eccentric principles of socialistic philanthropy (1).

Remuneration must be that which is thought to be fitting and proper for the services rendered, and must be reasonable. Lord Sumner emphasized the necessity of reasonableness and after pointing out that the courts are ill-equipped to weigh the merits of one solution of a particular question as against the other, said the auditor was entitled to ask whether the council had been guided by aims and objects not open to them, and that to the extent to which they had in consequence exceeded a reasonable expenditure it was his duty to disallow it. His view seemed to be that the court cannot interfere unless the remuneration is both unreasonable in amount and unreasonable because the council have given weight to matters not open to them. Lord Wrenbury emphasized the view that anything beyond a reasonable pecuniary equivalent of the services rendered is not wages.

The problem presented to the council was, as I have said, that while the services rendered remained of the same value, the salaries they were paying had become of less value. The currency in which the salaries were paid was depreciated, in that the purchasing power was reduced. The Board of Trade index showed that the cost of living had gone up by 29 per cent., 100*l.* was worth about 77*l.* or, put in another way, 129*l.* was required to do what 100*l.* had done in the past. To what extent was it fair and reasonable for an employer to make good that deficiency? It is plain from the passages to which I have referred that increased cost of living is a matter to which an employer ought to contribute, meaning by "ought" that it would be unfair and unreasonable not so to do. If the council were entitled to contribute to the increased cost of living, surely it was for them to say to what extent and in what manner they would so contribute. If increased cost of living is a matter properly calling for the consideration of the employer, it must be relevant to ascertain to what extent any particular applicant or class of applicants is affected by the increase. If the applicant lives in, and is fed and housed by the employer, an increase in pay might not unreasonably be refused. If he is a single man he is not affected as much as a married man with a family. The obligation to contribute to a deficiency in the salary of the latter must be greater than that of contributing to the deficiency in the salary of the former.

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(1) [1925] A. C. 578, 592, 594.

To my mind, it is wholly wrong to say that the contribution has no relation to the services rendered or to the value of the services rendered. That value was fixed before the war, and the contribution challenged was a step, and only a step, towards making good that value. In Exhibit D, which is the report on this matter of the salaries, wages and labour committee to the council, I find this passage: "As regards "cost of living, although the Ministry of Labour index figures "show that an increase of 29 per cent. has taken place since "the outbreak of war, at no point in their application do the "recommendations attempt to give more than a partial "recompense for this." I cannot see that the fact that Mr. Wilkes is content to accept an addition of 20*l.* 10*s.* to his salary of 450*l.* because he has no children, makes it unfair and unreasonable for Mr. Smallman to want and receive an addition of 31*l.* 19*s.* 8*d.* to his salary of 450*l.* because, having two children, he is more badly hit by the depreciation of the purchasing power of that salary. It is not putting the matter accurately to say that the 5*s.* a week paid to Mr. Smallman was paid because he had two children or as a reward for having two children. It was paid to him because having two children he suffered more from the reduction in the true value of the salary paid to him than did Mr. Wilkes.

The fundamental fallacy in the auditor's view, I think, best appears in a short paragraph on page 3 of his reasons: "The "addition of children's allowances imports into the payment "'a motive of philanthropy or generosity stripped of com-"'mercial considerations' and is 'an addition to the reasonable "'pecuniary equivalent of the services rendered' which is "measured by the basic salary plus the basic war bonus. "It is therefore not remuneration or salary within the meaning "of the statutes, but a gratuity, and therefore unlawful." There is no warrant for saying that Mr. Wilkes' 20*l.* 10*s.* made his remuneration, or that a similar sum would have made Mr. Smallman's remuneration, the pecuniary equivalent of the services rendered, or for saying that that equivalent is measured by the basic salary plus the basic war bonus. The agreed pecuniary equivalent of the services rendered was 450*l.* of pre-war value. An addition of 4½ per cent. when the cost of living has risen by 29 per cent. does not maintain or produce anything like that pecuniary equivalent, and Mr. Smallman's 31*l.* 19*s.* 8*d.*, which was only an addition of about 7 per cent., left his remuneration still far below its pre-war value, and therefore far below the pecuniary equivalent of his services. To apply Lord Wrenbury's test, the payments challenged were in fact a contribution and only a contribution to the pecuniary equivalent of the services rendered. Applying Lord Sumner's test, I cannot see how it can be said that the council were guided by objects and aims not open to them. In my judgment, tested by any of the tests suggested in *Roberts* v. *Hopwood* (1), these payments were fair and reasonable. They had the clearest relation to the services rendered in that they were made to bring, and not wholly but only partially, the remuneration of the class most badly hit by the war up to pre-war value. If the council had brought every salary right up to pre-war value, they would have been within their rights. That is clear from the Poplar case. If so, it must be within their power to bring some only of the salaries (the salaries of the hardest hit) up to pre-war value and, of course, still more must it be within their power to bring

(1) [1925] A. C. 578.

those salaries part way up to pre-war value. I think the motion must succeed.

Motion allowed.

Solicitors for Birmingham City Council: *Sharpe, Pritchard & Co., for Town Clerk, Birmingham.*

Solicitors for District Auditor: *Bircham & Co.*

A. W. G.

C. A.
1943
Dec. 9.

MILLER *v.* OWNERS OF THE SHIP OTTILIE.

Workmen's compensation — Fisherman — " Remunerated . . . mainly " by shares in the profits "—Poundage exceeding wages, risk money, and value of food—Workmen's Compensation Act (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 35, *sub-s.* 2.

The workman, who was employed as cook on a steam fishing-trawler belonging to the employers, was paid weekly a basic wage of 2*l.* 3*s.* 9*d.*, and he also received 1*l.* 5*s.* 0*d.* risk money, and food valued at 18*s.*, a total of 4*l.* 6*s.* 9*d.* In addition he was entitled to " poundage " based on profits which amounted in his case to 7*l.* 9*s.* 0*d.* a week :—

Held, that the workman was " remunerated . . . . mainly by " shares in the profits . . . . of the working of the vessel " within the meaning of s. 35, sub-s. 2 of the Workmen's Compensation Act, 1925, and that the Act did not apply to him.

APPEAL from Great Grimsby county court.

The workman, Herbert Ernest Miller, was employed as cook on board the steam fishing trawler *Ottilie* belonging to the employers for a fishing expedition from January 11 to February 5, 1943. While so employed he suffered an injury by accident for which he claimed compensation under the Workmen's Compensation Act, 1925. The employers resisted the claim on the ground that he was not a workman to whom the Act applied by reason of the fact that he was remunerated mainly by shares in the profits or the gross earnings of the working of the vessel in which he was employed within the meaning of s. 35, sub-s. 2, of the Workmen's Compensation Act, 1925(1). By the terms of his agreement the workman's remuneration consisted of a basic wage of 2*l*. 3*s*. 9*d*. a week, and he also received risk-money, amounting to 1*l*. 5*s*. 0*d*. a week, and food to the value of 18*s*. a week, making together 4*l*. 6*s*. 9*d*. In addition, the agreement provided for the payment to him of "poundage" representing a share in the profits earned by the vessel. This "poundage" amounted, during the material period, to 7*l*. 9*s*. a week, bringing his total remuneration from all sources up to 11*l*. 15*s*. 9*d*. a week. The county court judge held that the "main" remuneration of the workman was that on which he knew he could depend for the maintenance of himself and family, namely, the basic wage and the risk money which were stable in their character, and not the fluctuating addition from poundage which was dependent on many uncertain factors. He was, therefore, of opinion that the workman was not "mainly" remunerated by shares in the profits or gross earnings of the vessel and so excluded from claiming compensation under the Act, and he made an award in his favour. The employers appealed.

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(1) Workmen's Compensation Act, 1925, s. 35, sub-s. 2: " This " Act shall not apply to such " members of the crew of a fishing " vessel as are remunerated wholly " or mainly by shares in the " profits or the gross earnings of " the working of such vessel " . . . ."

Beney K.C. and *Dare* for the employers. It has already been decided in *Costello* v. *Owners of the Ship Pigeon* (1), which was concerned with the same agreement as in the present case, that poundage is a remuneration by a share of profits. The county court judge gave too narrow a construction to the word "mainly" which should bear the meaning placed on it in the Oxford Dictionary, namely, "for the most part," "chiefly," "principally." As the workman received from poundage in the present case about three-fifths of his total remuneration, it is clear that he was "mainly" remunerated by a share in the profits, and, consequently, the Act has no application to him.

C. L. Henderson K.C. for the workman. The decision of the county court judge was right. Whether or not the workman comes within the ambit of s. 35, sub-s. 2, depends on the construction of his agreement, and that must be construed by reference to what the workman may expect to earn under it having regard to the circumstances existing at the time when it was made, and not by reference to any sum which he may receive at a distant date. The county court judge rightly confined his attention to the circumstances as they existed at the time of the making of the agreement, there being no

(1) [1913] A. C. 407.

evidence before him that there was any certainty at that date that the workman would earn a sum in excess of his fixed sources of remuneration. He was, therefore, justified in saying that the fortuitous receipt of additional wages under the workman's contract could not be said to be his main remuneration.

SCOTT L.J. [after stating the facts, continued:] The county court judge came to the conclusion that the word "mainly" in s. 35, sub-s. 2, of the Workmen's Compensation Act, 1925, must be interpreted, not with regard to the ratio between the poundage source of remuneration and the wages source, but with regard to other considerations, inapplicable, as it seems to me, to a section relating essentially to the quantum and form of remuneration. I do not think it necessary to discuss the details of his view. It is sufficient to say that, in my view, s. 35, sub-s. 2, is concerned, at any rate primarily, with the ratio between weekly wages of a fixed type, whatever their name, and the uncertain remuneration obtained by a member of a crew, as a kind of co-partner, out of the net earnings of the adventure. Judged by that criterion, *7l.* *9s.* a week out of *11l.* *15s.* *9d.* is obviously the main part of the workman's total remuneration, and, if the figures I have given are to be treated as the fair index of the results of his employment which had to be considered by the county court judge for the purpose of construing the sub-section, that is an end of the case.

It has been argued on behalf of the workman that the voyage in question could not be treated as a fair criterion, and that the judge, or, at any rate, this court, is justified in disregarding the one voyage and should look for some other measure. I think that the important consideration to bear in mind is that the agreement which defines the total remuneration of each member of the crew and has to be signed by each member on his joining the adventure must necessarily look forward, because an accident might occur on the first day of the voyage which would result in a member of the crew putting forward a claim which the employers might resist on the ground that the man was not within the Act because of the provisions of s. 35, sub-s. 2. The ascertainment of the nature and amount of the workman's remuneration contemplated in the agreement must, therefore, necessarily involve a consideration of the future, and, possibly, also of the past, with regard to the workman's service with his present or former owners. To reach any common sense interpretation, and application, of the agreement, it is essential to ascertain the real ratio which the amount of the remuneration received by the workman from a share in the profits bears to the amount which he receives in respect of wages, however difficult the facts obtaining at the moment of the accident may make such an inquiry.

In the present case, there was uncontradicted evidence that the workman did not come within the Act because his remuneration out of profits was greater than his remuneration by way of fixed weekly wages. That is sufficient to dispose of the appeal, but fortunately we are able to obtain some definite guidance on the question before us from the decision of the House of Lords in *Costello* v. *Owners of the Ship Pigeon* (1). In that case the House, in interpreting the same agreement as that with which we are concerned, held, though not unanimously, that the poundage there in question was remuneration by a share in the profits. That decision is binding on us, and it leaves the meaning of the word " mainly " as the only new question for us to decide. I cannot see any ambiguity in the word. The sub-section lays down a criterion to be measured quantitatively in terms of money, and, as the major part of the present workman's earnings is derived from his share of the profits, he is " mainly " remunerated " by shares in the profits " within the meaning of the sub-section. The appeal must be allowed.

LUXMOORE L.J. I agree. The case is said to raise a novel point, namely, what is the meaning of the phrase " remunerated " . . . . mainly by shares in the profits " in s. 35, sub-s. 2, of the Workmen's Compensation Act, 1925 ? Looking at the amounts derived from the different sources of the workman's earnings, the poundage works out at roughly three-fifths of the whole wages. I should have thought that it was perfectly clear that " mainly " in the sub-section is used in its ordinary meaning. In the Oxford Dictionary the word is defined as meaning " for the most part ; chiefly ; principally." The county court judge, however, has put a meaning on the word for which I am unable to find any foundation. He says : " The word ' mainly ' is to be interpreted in its general " sense "—I do not know what he means by " its general

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(1) [1913] A. C. 407.

"sense." The general sense is "principally" or "chiefly" or "for the larger part." He goes on: "and not as applying "exclusively to the monetary aspect of pay as disclosed at "the end of the employment. The main remuneration is that "on which a worker knows he can depend from week to week "and not the fluctuating addition which is dependent on "many uncertain factors." It seems to me that the test which the county court judge is applying is one of stability. He has, so far as I can see, no possible foundation on which to base such a view. Taking the ordinary meaning of "mainly" and applying it to a case where three-fifths of a workman's remuneration are derived from a share in profits, the only possible conclusion is that he was mainly remunerated by the share in the profits. I think the appeal should be allowed.

du Parcq L.J. I agree. In my opinion, the question whether the workman was remunerated mainly by a share in the profits of the working of the vessel in which he was employed must be answered by ascertaining the facts which were in the contemplation of the parties when the contract of service was entered into. The only possible conclusion on the evidence of the workman is that his remuneration did consist mainly of a share in the profits, and that he was, consequently, excluded from the Act by sub-s. 2 of s. 35. I agree with what has been said about the judgment of the county court judge. In so far as the sub-section deals with persons remunerated mainly by shares in profits, it would cease to have any effect if the view of the county court judge were adopted. He says "The question what is the main remuneration can only "properly be determined by considering all the incidents and "chances of the trip and of the employment . . . . The "uncontradicted evidence of the workman shews that when "he leaves port after signing the agreement he is not certain "whether any poundage will be payable to him at the end "of the trip." After suggesting the possibilities of a breakdown in machinery, or of a storm at sea and so on, he adds: "The only certain remuneration is the fixed wage and risk "money, and on that he must mainly depend for the "maintenance of himself and family." To take that view is, I think, to re-write the sub-section and make it read in some such way as this: "This Act shall not apply to members of "the crew of a fishing vessel whose remuneration in so far as "it is certain consists mainly of shares in the profits or the "gross earnings of the working of such vessel." If the section were re-written in that form, it would at once appear that there never could be a case in which remuneration, in so far as it was certain, could consist "mainly" of something which must always depend on a variety of chances. No fisherman can ever be sure that a share in the profits over a period will much exceed, or exceed at all, the basic wage, since it is always possible that by a series of mischances he may be deprived of what he expected to earn, when the agreement was entered into. I agree with the order proposed.

Appeal allowed.

Solicitors for employers: *Smith & Hudson, for Walter West, Great Grimsby.*

Solicitors for workman: *Mott & Parkes, for H. K. & H. S. Bloomer, Great Grimsby.*

P. B. D.

BROWN *v.* STAFFORD.

C. A.
1943
Dec. 20.

Emergency legislation—Courts Emergency Powers—Examination as to means—Judgment debt—Leave to proceed to execution suspended, subject to payment of monthly instalments, under Courts (Emergency Powers) Act, 1939 (2 & 3 *Geo.* 6, *c.* 67)*—Right of plaintiff to order for examination—R. S. C., Or. XLII, r.* 32.

A judgment creditor for a considerable sum obtained, under the Courts (Emergency Powers) Act, 1939, leave to proceed to execution, such leave to be suspended on payment by the debtor of monthly instalments. Two years later the judgment creditor applied under R. S. C., Or. XLII, r. 32, to examine the debtor as to means:—

Held, (1.) that the Courts (Emergency Powers) Act, 1939, and the rules thereunder did not constitute a complete code, and that there was jurisdiction to make an order under Or. XLII, r. 32; (2.) that, although the judgment creditor's right to proceed to execution was suspended, he was a "person entitled to enforce "the judgment" within the meaning of r. 32; and (3.) that, in the absence of special circumstances, the judgment creditor was entitled to an order under r. 32 as of right and that no special circumstances had here been established, it not being as if the application under r. 32 had been made so soon after the order under the Courts (Emergency Powers) Act, 1939, as to be oppressive.

APPEAL from Cassels J.

On January 3, 1940, the plaintiff, Jesse Brown, sued the defendant, Charles Stafford, who was interested in gold mines and their exploitation, for damages, or, alternatively, for 7,000*l*. as money received by the defendant to the plaintiff's use. The action was compromised by a deed, dated February 20, 1940, by which the defendant admitted the debt of 7,000*l*. and agreed to pay it as to 200*l*. at once, and the balance by monthly instalments of 25*l*., beginning on June 20, 1940. In the event of default for one calendar month the whole balance of the sum then remaining owing was to become immediately payable. It was a term of the deed that the debt of 7,000*l*. was to be deemed to have become due under a contract made before September 1, 1939, with a view to making the Courts (Emergency Powers) Act, 1939, applicable. The defendant made default after the first payment of 200*l*., and on February 24, 1941, the plaintiff obtained judgment for the sum of 6,800*l*. He then applied for leave to proceed to enforce the judgment as required by the Act of 1939, and on May 21, 1941, leave was given by Master Ball, such leave to be suspended provided the defendant paid the judgment debt by monthly instalments of 100*l*. beginning on June 2, 1941. On June 27, 1941, Asquith J. varied the order by reducing the instalments to 25*l*. a month. These instalments had since been duly paid. On July 29, 1943, Master Jelf dismissed an application by the plaintiff for an examination of the defendant as to means under R. S. C., Or. XLII, r. 32, and on October 22, 1943, Cassels J. dismissed an appeal from the master. The plaintiff appealed.

Beney K.C. and *Morle* for the plaintiff. Order XLII, r. 32, provides that a party entitled to enforce a judgment debt may ask for the examination of the debtor as to means. Information has reached the plaintiff leading him to think that the defendant's means have improved since the order of June 27, 1941, was made. Under the Courts (Emergency Powers) Act, 1939, there is power to apply for the variation of an order preventing the enforcement of a judgment, and it is in view of this that it is sought to examine the defendant as to means: see *Brandon* v. *Reidy* (1). The argument for the defendant in the court below was that the Courts (Emergency Powers) Act, 1939, and the rules thereunder, were a self-

(1) [1940] 2 K. B. 194.

contained code, and, therefore, that an application could not be made under Or. XLII, r. 32. This was practically decided to the contrary in *Fagot* v. *Gaches* (1). When, apart from the Courts (Emergency Powers) Act, an order had been made for payment by instalments of a judgment debt, an application to examine the defendant as to means was readily made: *Hayter* v. *Beall* (2).

Sellers K.C. and *Harold Simmons* for the defendant. The Courts (Emergency Powers) Acts, and the rules made thereunder, provide a complete code, and in such a case as the present an application under the Rules of the Supreme Court cannot properly be made. The order made under the Act makes it unlawful for any further examination of the defendant to be made, seeing that there has been no default by him in paying the instalments ordered. [LORD GREENE M.R. If that were right *Galbraith* v. *McKenna* (3) would have been rightly decided, but this court overruled it in *Fagot* v. *Gaches* (1).] In *Galbraith* v. *McKenna* (3) this point was not taken. They referred to *Sturges* v. *Countess of Warwick* (4).] If, however, there was power to make an application under Or. XLII, r. 32, Cassels J. exercised his discretion to refuse the application, and this court ought not to interfere. Lastly, the plaintiff is not a " party entitled to enforce the judgment " within r. 32 because his leave to do so is suspended.

LORD GREENE M.R. The first question that arises is as to the jurisdiction of the court to make an order under Or. XLII, r. 32. Under the Courts (Emergency Powers) Act a successful plaintiff is prohibited from proceeding to execution under his judgment without the leave of the court. The order in this case gave leave, but suspended it. On the application for such an order the burden of satisfying the court that leave to proceed should not be given, or should only be given on terms or subject to qualifications, was on the defendant, and he succeeded in satisfying the court to the extent of getting the order suspended so long as he paid 25*l*. a month. It is argued that Or. XLII, r. 32, cannot be enforced so long as there is in existence an order suspending the right of the plaintiff to proceed to execution. The phrase used in the rule is: " The " party entitled to enforce the judgment," and it is said that,

(1) [1943] K. B. 10.
(2) (1881) 44 L. T. 131.
(3) [1941] Ch. 137.
(4) (1913) 30 T. L. R. 112, 154.

so long as such a suspension order remains in operation, the plaintiff has no right to enforce judgment, and, therefore, cannot obtain an order for the examination of the defendant as to his means under the rule.

In my opinion, that is a misconstruction of the rule. The phrase, "the party entitled to enforce the judgment," accurately describes the position of a plaintiff who, under the terms of a suspension order such as we have in the present case, is for the time being prevented from proceeding to execution. A person in that position is, in my opinion, properly described as a "party entitled to enforce the judgment." He can always proceed to take the necessary steps towards enforcing it. For instance, at this moment, if the plaintiff could produce the necessary evidence, he could apply to have the suspension order revoked and for leave immediately to enforce the judgment. The wording of the rule, in my view, was framed, not to lay any particular emphasis on the word "entitled" in the sense in which Mr. Sellers would have us interpret it, but as a comprehensive phrase to cover not only a successful litigant, but his assignee or his personal representative or anybody claiming through him.

It is to be noticed that in *Galbraith* v. *McKenna* (1), the plaintiffs who were applying for an order under r. 32 had obtained a judgment which was subject to the terms of the Courts (Emergency Powers) Act but did not obtain leave to proceed. By the very language of the Act, therefore, they were not entitled to proceed to execution without an order of the court and they were in that respect in just as bad a position as the present plaintiff. Simonds J. decided that case against the plaintiff because, in his view, an application for an order under r. 32 was the taking of a step to execution or enforcement of a judgment. It was not suggested before him, nor does he suggest in his judgment, that, apart from that point, the plaintiffs were not persons entitled to enforce the judgment within the meaning of the rule. It is true that that case was overruled by this court in *Fagot* v. *Gaches* (2), on the specific point on which Simonds J. had decided it, namely, the interpretation of s. 1 of the Courts (Emergency Powers) Act, which forbids a plaintiff proceeding to execution or otherwise for the enforcement of a judgment without the leave of the court. Nevertheless, the plaintiff's right to enforce the judgment is preserved, and, if the present argument of Mr. Sellers were correct, this court ought not to have overruled Simonds J. However, the argument, in my opinion, fails on the construction of the rule for the reasons which I have stated.

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(1) [1941] Ch. 137.

(2) [1943] K. B. 10.

It was further argued against the jurisdiction to make an order under the rule that the rules made under the Courts (Emergency Powers) Act make their own provision for review of orders made under the Act. The plaintiff who wishes to have an order reviewed must himself show that the circumstances have altered since the original order was made, so as to disentitle the defendant to the indulgence which he previously obtained. These rules say nothing about Or. XLII, r. 32, nor do they make any express provision for examining a defendant who is claiming to hold the benefit of an order he has obtained suspending or qualifying the plaintiff's right to levy execution. I cannot help thinking that the reason why the rules under the Courts (Emergency Powers) Act are silent on that matter is that there is already in the Rules of the Supreme Court Or. XLII, r. 32, which enables a plaintiff to discover, by examination of the defendant, what he could not otherwise discover except by some piece of good luck. If there were no jurisdiction to make an order under r. 32, the defendant in such a case as this would be in a position of great security. Having discharged the burden of proof when the first application under the Courts (Emergency Powers) Act was made he could continue to rest on this order, however much his circumstances had changed for the better, unless the plaintiff had the good fortune to obtain evidence justifying a modification of the order. The joint operation of the Courts (Emergency Powers) Act and r. 32 appears to produce an eminently beneficent and just result because the defendant who is protected can be made to come out in the open and be examined so as to provide the plaintiff with material he could not otherwise get and on which he can base a subsequent application to have the suspension order altered in his favour. In my opinion, the question of jurisdiction is one which must be decided against the defendant.

Lastly, it is said that the judge exercised his discretion under the rule, and that this court ought not to interfere with it. We have not the advantage of any reasoned judgment, and I certainly would not assume that the judge misdirected himself in the sense that he held that he had no jurisdiction to entertain the application. He seems to have made his order on the view that it was proper to refuse to make it. The point made before him to induce him to act in that way appears to have been that the defendant had been closely examined when the original order was made two years before, and, therefore, that it would be wrong now to submit him to a further examination. The judge must have accepted that view, and it was said that we ought not to interfere with his discretion. It is perfectly true that when the language of r. 32 is looked at it is couched like many other rules, in discretionary form. The word used is "may," but if anyone chooses to search through the Rules of the Supreme Court he will find that many rules use the word "may" when nobody would suggest that the court has any real discretion to refuse to exercise the powers conferred. Mr. Sellers fairly and rightly admitted that in the ordinary case, apart from the Courts (Emergency Powers) Act, the order for examination of a debtor is made practically as of course. That does not mean that in very special circumstances there may not be a discretionary power to refuse such an order, but a refusal would be contrary to the universal practice under the rule.

Prima facie, therefore, the plaintiff having obtained judgment against the defendant previously could come to the court and say: "I am entitled to an order for the examination of "the defendant as to means practically as of right," and in the absence of special circumstances the judge would have been wrong in refusing it. What, then, are the special circumstances which are said to deprive him of that right? They are nothing more than that two years before the defendant was fully examined as to his means. A great deal may happen in the case of a man whose finances are made and unmade in the particular way in which the defendant earns his living, and to say that the plaintiff, before he can get an order under this rule, must himself produce affirmative evidence merely because two years ago the defendant was examined, appears to me to be taking the wrong view of the scope of the rule. As I read it, a plaintiff is entitled to the order unless clear circumstances are shown to take that right away from him. I quite accede to the view that, if, after a full examination under the Courts (Emergency Powers) Act, the plaintiff came a week or two afterwards and said: "I want a further examination "under r. 32," the court would unquestionably have power to say: "You discovered all you could a month ago and to make "an order for another examination now would be oppressive."

C. A.
1943
BROWN
v.
STAFFORD.
Lord Greene M.R.

That would be a sufficient reason for departing from the normal practice of making an order as of course, but the facts in the present case are widely different. Two years have elapsed during which anything might have happened. In my opinion, the learned judge cannot have had these considerations fully in his mind when he refused this order. The appeal ought to be allowed.

MACKINNON L.J. I agree.

GODDARD, L.J. I agree that the plaintiff is entitled to enforce the judgment within the meaning of Or. XLII, r. 32, which gives a party so entitled a right, when the circumstances justify it, to an order for the examination of the judgment debtor. There is nothing in that rule to say that the plaintiff must be entitled to enforce his judgment at once, nor is there any decision which obliges us to say that. The note in the Annual Practice referring to *Sturges* v. *Countess of Warwick* (1) is much too wide. The majority of the court in that case did not pronounce in favour of any such binding rule as appears there to be stated, but, of course, the court can always prevent an abuse of its own procedure, and if, soon after an examination has been held, the judgment creditor asks for a second examination without showing that some new fact, which he could not put at the first examination, has come to his knowledge, the court can say that that was an abuse of its procedure and refuse to make an order. I can, however, see no reason why, after a decent interval has elapsed, in which the circumstance of the debtor may have changed, he should not be required to submit himself to a second examination. That is quite apart from the Courts (Emergency Powers) Act. No doubt, in a case in which that Act applies, it is right to take into account that there has been an examination of the debtor on the judgment creditor's application for leave to proceed, and I think the same consideration should apply if an application is made afterwards under Or. XLII, r. 32. Unless the judgment creditor can examine the debtor or cross-examine him, it is only by pure luck that he could obtain the necessary evidence to enable him to discharge the burden which would lie on him if he applied for a variation of the order. After all, the Courts (Emergency Powers) Act, is only intended to protect a man who, owing to war circumstances, is

(1) 30 T. L. R. 112.

unable immediately to pay his debts. It is not meant to give him an unlimited moratorium if he can, but will not, pay his debts; and, even if this case were regarded as a mere matter of discretion, I should say that there was no ground here on which the discretion to refuse an order could properly have been exercised. The appeal should be allowed.

Appeal allowed.

Solicitors: *Kenneth Brown, Baker, Baker*; *Bernard Shaffer.*

H. C. G.

C. A.
1943
Nov. 4; *Dec.* 13.

FIELD *v.* GOVER.

Landlord and tenant — Rent restriction — Overpaid rent — Recovery — "Increase of rent"—No increase in contractual rent—Contractual rent more than standard rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 1.

The defendant was the tenant of a house which became a controlled house for the first time on September 2, 1939, by virtue of the provisions of the Rent and Mortgage Interest Restrictions Act, 1939. Down to July, 1939, one room in the house had been sub-let at the rent of 11*s.* 6*d.* a week. On the termination of that sub-tenancy, the room remained vacant until May 25, 1940, when it was sub-let by the defendant to the plaintiff at the rent of 10*s.* a week. On July 11, 1942, the county court judge, on the application of the plaintiff, declared the standard rent of the plaintiff's room to be 3*s.* 8*d.* a week. The plaintiff thereupon brought an action against the defendant to recover the difference between the aggregate of the amount of rent paid by him at the rate of 10*s.* a week and the aggregate of the apportioned standard rent, on the ground that under s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 3, sub-s. 1 and sched. I to the Rent and Mortgage Interest Restrictions Act, 1939, such rent would be irrecoverable by the landlord and was therefore recoverable by the tenant as rent overpaid. Section 1 of the Act of 1920, as amended, provides that, "where the rent "of any dwelling-house . . . . has been since September 1, 1939, "or is hereafter increased then if the increased rent . . . . exceeds ". . . . the standard rent the amount of such excess shall . . . . "be irrecoverable from the tenant":—

Held, that the condition precedent in the section to the recovery of rent overpaid was an increase, since the prescribed date, of the contractual rent above the standard rent, and not of the contractual rent above some pre-existing figure, and that the plaintiff was entitled to recover.

Per Scott L.J. Although the apportionment of the standard rent by the county court judge is made final and conclusive, *quaere*, whether a wrong principle of law had not been applied by him in fixing the amount.

APPEAL from Brentford county court.

The defendant, Vera Marjorie Gover, was the assignee of the lease of premises known as No. 119 The Grove, Ealing, of which the rent was 95*l.* per annum, and the rateable value 60*l.* per annum. The lease expired in 1939, and on its expiration, the defendant remained in occupation as tenant from year to year. On September 2, 1939, the house, which had previously been uncontrolled, became subject to control under the Rent and Mortgage Interest Restrictions Act, 1939. Before September 2, 1939, one room in the house had been sub-let to one Mackenzie at a weekly rent of 11*s.* 6*d.* That sub-tenancy terminated in July, 1939, and the room remained vacant until May 25, 1940, when it was sub-let by the defendant to the plaintiff, Frederick William Field, at a weekly rent of 10*s.* On July 11, 1942, the plaintiff applied to the county court judge to apportion the standard rent of the room, as provided by s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, and the county court judge declared the standard rent of the room to be 3*s.* 8*d.* a week. The plaintiff thereupon brought an action under s. 14, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to recover 24*l.* 5*s.* 4*d.*, being the excess of the total rent paid by him at the rate of 10*s.* a week over and above the aggregate of the standard rent of 3*s.* 8*d.* a week, calculated over the period covered by his claim. By s. 1 of the Act of 1920 (as amended by s. 3, sub-s. 1, and sch. I to the Act of 1939): "where the rent . . . . has been "since September 1, 1939, or is hereafter increased, then if "the increased rent . . . . exceeds the standard rent . . . . "the amount of such excess shall . . . be irrecoverable from "the tenant." By s. 14, sub-s. 1, of the Act of 1920, the amount recoverable by a tenant in respect of rent overpaid is any sum which by virtue of the Act is irrecoverable by the landlord as rent. The county court judge held that the increase of rent referred to in s. 1 of the Act of 1920, as amended by s. 3, sub-s. 1 and sch. I to the Act of 1939, was an increase above the standard rent and not an increase above the previous contractual rent. He, accordingly, gave judgment for the plaintiff for the amount claimed. The defendant appealed.

Ethel Lloyd Lane for the defendant. The county court judge was wrong in holding that s. 1 of the Act of 1920 must be read as if the words " above the standard rent " followed the words " where the rent . . . . has been, or is hereafter increased." The words appeared in s. 1 of the 1915 Act, but they were omitted from the 1919 and 1920 Acts. The latter Act was not only a consolidating but an amending statute and by sch. II it repealed the Act of 1915 in toto. If, in an amending Act, words are omitted, the omission must be taken to be intentional. There is no authority on the particular question raised here and in none of the Acts is there any definition of " rent " simpliciter. Only " standard " and " net " rents are defined. Therefore rent in s. 1 of the 1920 Act must be given its ordinary meaning of the pecuniary consideration paid for the use and occupation of the premises let, in other words the actual de facto rent reserved. The words of the section are capable of a plain and ordinary construction, and there is no justification for giving them an artificial meaning by importing into the section additional words from a repealed statute. Under the section an actual increase of the contractual rent is a condition precedent to the recoverability by the tenant of the excess paid by him. In the present case there was no increase in the plaintiff's rent when he became sub-tenant of the room in 1940, and he is therefore not entitled to recover. The object of the Rent Restriction Acts throughout has been the same, the stabilizing of rents and not the penalizing of landlords. If the county court judge's construction of the section is right, the landlord would be compelled to retain the contractual tenant at a rent which might be lower than the actual cost of the room to him.

Shove for the plaintiff. The decision of the county court judge was right. It cannot be said that on September 1, 1939, the rent of the room concerned was the same for which it had been let some months or years previously. Although on the material date the room was not let separately, it was let, because the whole of the house was then let to the defendant (*Woodhead* v. *Putnam* (1)), and the rent of the room on September 1, 1939, was its standard rent when that had been ascertained in accordance with s. 5 of the Act of 1938. When the rent was apportioned in 1942, the apportionment operated retrospectively (*Kimm* v. *Cohen* (2)) and consequently the letting

(1) [1923] 1 K. B. 252.

(2) (1923) 40 T. L. R. 123.

to the plaintiff at 10s. a week in 1940, was an increase of the rent in excess of the standard rent, after September 1, 1939. In s. 3, sub-s. 2, of the Act of 1920, which deals with, and is referable only to, increases above the standard rent, the words used are "rent," "increased," and "such increases." The legislature did not think it necessary to speak of "increases "above the standard rent," because "standard rent" is the hub round which all the provisions of the Rent Restrictions Acts revolve, so far as increases of rent are concerned. Here there was clearly an increase of rent, and the increased rent exceeded the standard rent, with the result that the excess is recoverable by the tenant.

Cur. adv. vult.

Dec. 13. The following judgments were read:

SCOTT L.J. In this appeal the court is agreed on its conclusion, but my brethren do not agree with the whole of my reasoning in matters to which I felt bound to call attention because of the importance to the public of the problems involved in the interpretation of the sections of the Acts which have been considered.

The appeal raises a point under the Rent Restriction Acts and discloses a case of great hardship which it is difficult to suppose was within the mind of Parliament when it passed the relevant legislation. It arises out of the provision for fixing a "standard rent." I have read the judgments of my brethren and agree with their conclusion that the appeals must be dismissed; but the result seems to me so unfair that, although I dismiss the appeal on the ground that there is no right of appeal to us from the fixing of the standard rent, I will state the reasons which, to say the least, make me doubt whether, on the proper construction of the statutes, Parliament intended it. Whether remedial legislation is either desirable or possible is not for me to say.

The argument of the defendant turned chiefly on the proper interpretation of s. 1 of the Act of 1920 as amended by the Act of 1939. As so amended the relevant words are as follows: "Subject to the provisions of this Act" (that is to say, the principal Acts as amended by the 1939 Act) "where the rent "of any dwelling-house to which this Act applies has been since "September 1, 1939, or is hereafter" (that is, after September 1, 1939) "increased, then, if the increased rent exceeds the "standard rent by more than the amount permitted under this

" Act, the amount of such excess shall, notwithstanding any " agreement to the contrary, be irrecoverable from the tenant." No question arises in the case about permitted increases. The plaintiff's room, when let in 1940, became " a separate " dwelling " within s. 12, sub-s. 2, of the Act of 1920 as applied by s. 3, sub-s. 1, of the Act of 1939. At no time after the whole house had become controlled was the rent of the plaintiff's room ever increased. If the rent of the room before control when let to Mackenzie is relevant, the letting to the plaintiff effected a reduction of the rent. Indeed, it may be that the room was a separate dwelling-house when Mackenzie had it, and that the rent of 11*s.* 6*d.* was, therefore, the standard rent. The argument for the plaintiff, and the judgment of the county court judge were both based on the legal view that under s. 1 of the 1920 Act the condition precedent that there should have been an " *increase* of rent " is satisfied if, on a first creation of a separate dwelling-house out of a larger house, by the letting of a part of the whole, the rent then fixed by agreement between the parties for the part is actually higher than the standard rent would be if it were ascertained by the court by apportionment under s. 5 of the Act of 1938. The argument for that view is very strong, but, as applied in cases like the present, it works such extreme hardship that I think the court should reject that conclusion unless the language of the relevant sections is absolutely clear. Except for one provision it is clear enough. That provision is s. 5 of the Act of 1938.

Before dealing with that section I will state the considerations which make me think it inconsistent with the general scheme of the Acts when applied to such a case as the present. The word " rent " in s. 1 of either the Act of 1920 or the Act of 1939 means rent in the ordinary sense—the periodic payment due from a tenant under his lease or other contract of tenancy—and the condition laid down in the section predicates an actual raising by the landlord of rent in that sense, whether it is the existing tenant whose rent is increased or a new tenant to whom the landlord has made the increased rent a term of his offer of a new tenancy. The wording of the section was different in the repealed Act of 1915. There s. 1, sub-s. 1, expressly dealt with any increase " *above the standard rent as hereinafter defined* " ; and s. 2, sub-s. 1 (*a*), defined it as the rent at which the dwelling-house was let on August 3, 1914, or, if not then let, on the last previous letting (if any) or when first subsequently let, being the same provision as later in the 1920 and 1939 Acts with the necessary changes of date. The 1919 Act, by s. 2, allowed an increase of not more than 10 per cent., and by s. 4 amended s. 1, sub-s. 1, of the 1915 Act (inter alia), by omitting the words "above the standard rent," to which I have called particular attention. Even if they had appeared in the Act of 1919, and had been repeated in 1920 and 1939, I should have felt great difficulty in holding that the requisite of *an increase of rent* is satisfied without any actual increase of the new *contractual* rent over the previous *contractual* rent, but when the words of the 1915 Act were omitted by Parliament, I think the intention must have been to avoid any possible doubt, and to make it clear that the Act of 1919 only applied *when an actual increase of rent had been made*. The Act of 1939 merely left the crucial words of s. 1, sub-s. 1, of 1920 unaltered. It would thus appear, prima facie, on the interpretation of the language of s. 1, sub-s. 1, of the Act of 1920, on which the plaintiff has to rely, to make the excess over 3*s*. 8*d*. "irrecoverable" by the landlord, and, therefore, if paid by the tenant, recoverable back by him from the landlord under s. 14 of the Act of 1920, s. 8, sub-s. 2 of the Act of 1923, and s. 7, sub-s. 6 of the Act of 1938, that here, there having been no *actual* increase of rent, the plaintiff could not succeed.

Even if it be said that the above statutory language is not, as I think, clear, there are certain considerations which go to support my construction. (1.) The Acts are all concerned with actual rents, with the amount of money payable as rent, and the expression "standard rent" does not mean a stereotyped *actual* rent, any more than the expression "minimum wage" in a statute means a stereotyped *actual* wage. It is merely an upward limit in the one case and a downward limit in the other. (2.) Under all the Acts, including that of 1939, the standard rent itself is, prima facie, ascertained in the first instance by reference to the actual rent (*a*) payable at a date named in the Act, or (*b*) the last rent previously paid, or (*c*) the first rent paid thereafter. In the 1915 Act it was August 3, 1914; in the 1920 Act, passed on July 3, 1920, it was March 25, of that year; in the 1939 Act, September 1, 1939. (3.) The 1939 Act introduced a new criterion of control, namely, that of rateable value. This change had three effects: (*a*) it introduced control of houses as distinct from landlords; (*b*) it brought under protectional control all freehold houses within the rateable values named; (*c*) in the case of a "separate dwelling-house," carved out of a *freehold* house, it made the actual rent of that part its standard rent, whether already let on September 1, or when last previously let, or when first let at some subsequent date. To such a " dwelling-house " s. 5 of the 1938 Act could have no application. What would be the position of such a subsidiary " dwelling-house," when carved out of a larger house not previously controlled of which the occupier was not the freeholder but only a lessor or tenant, has not been the subject of judicial decision. I incline to think that, if the subsidiary dwelling-house had been created and let at a rent before the house containing it came under control, that rent had become its standard rent, and, once so fixed under the previous Acts, remained its standard rent, notwithstanding the 1939 Act. I take this view because s. 5 of the 1938 Act had no application to it (since the containing house was not controlled, a prerequisite of that section), and I think (not without doubt) that s. 12, sub-s. 3, of the 1920 Act, is on that point to be construed on the same lines, that is to say, that there is not to be apportionment unless both houses—the containing and the contained—are within the Acts. If I am right, on this view the standard rent of the plaintiff's room was 11*s.* 6*d.*, namely, the rent paid by Mackenzie. The Acts, however, contain no provision for a standard rent once notionally existing being subsequently varied by the court. The only question is whether the "house" constituted by Mackenzie's room, subsequently let to the plaintiff, possessed, even notionally, a standard rent. I incline to think that it did, but if it did, the learned judge made a mistake in attempting to apply s. 5 of the Act of 1938. Anyhow, it seems to me an extraordinary anomaly that the room should have a standard rent of 3*s.* 8*d.*, when, if the whole house had been freehold and not leasehold or under tenancy, it would have been 11*s.* 6*d.*

How strongly what I venture to call the common sense construction of the Acts, at any rate of the Act of 1939, points to this interpretation may be seen if one takes a concrete illustration. Suppose two houses, Nos. 20 and 21, in a continuous London street of identical construction and internal accommodation, as is so often the case, each having the same rateable value as the defendant's house in the present case, so that both came under the 1939 Act on September 1, 1939. No. 20 is the freehold of A. who lives in it. No. 21 is the leasehold of B. at 95*l.* a year rent, and she lives in it. A. and B. both, in January, 1939, let the front room on the ground floor to a weekly tenant at 11*s.* 6*d.* In each case the tenant went out before September, 1939, and neither room was re-let till May, 1940, when each let to a new tenant at 10*s.* In my view, the room in the freehold house became, in January, 1939, a "separate dwelling-house," and then acquired the status of a room with a standard rent of 11*s.* 6*d.*, and it still had that status on September 1, 1939, and that was its standard rent for ever, or till Parliament passed a new Act. Can it be said that A's room had a standard rent of 11*s.* 6*d.* and B's of 3*s.* 8*d.*? The anomaly would be outrageous if it could. Unless the language of the Acts is too clear to escape that result, the illustration serves to show that the county court judge was wrong in applying s. 5, of the Act of 1938, to the defendant's house.

The question may be examined from another angle. It is not quite certain that the Act of 1939 incorporates the whole of the Act of 1938, especially s. 5. The principal Acts were continued in force by s. 1, and were applied by the Act subject to modification, but the Act of 1938 was not a "principal Act," and the Act of 1939 did not make it one. It is true that s. 12, sub-s. 3, of the Act of 1920, as modified in 1939, was incorporated, but the question of s. 5 of the 1938 Act does not seem to have been considered. I express no opinion on this point.

In the result it is left, to say the very least, in doubt how far s. 5, of the Act of 1938, has any application to the 1939 Act houses which have had a room previously let, but, for the purpose of our decision on these appeals, that inquiry is academic. Parliament has made the determination of a standard rent by the county court judge final and conclusive: see s. 12, sub-s. 3, of the Act of 1920, and s. 5 of the Act of 1938; and, as the county court judge fixed this standard rent at 3*s.* 8*d.* by an adjudication in rem, the room has been given the permanent status of a "dwelling-house" with a standard rent of 3*s.* 8*d.*, and, as Parliament has said that the decision of the county court judge shall be "final and conclusive," no appeal would have lain from him to us against the fixing of the standard rent: see *Waterhouse & Co.* v. *Gilbert* (1). I am not satisfied that the judge's decision was right, but nobody now can say that it was wrong. A mere error in law is no ground for going behind his "final and conclusive" decision. I should add that the question of appeal from the standard rent is not before this court, and I deliver this judgment on the footing that it had been fixed, and, it having been fixed, there is no means on an appeal for the

(1) (1885) 15 Q. B. D. 569, 571.

C. A.
1943
Field
v.
Gover.

recovery of overpayments of going behind that fixing. I agree with the judgment proposed by my brethren, as I have already said, on the appeal.

Luxmoore L.J. [after stating the facts]: On June 11, 1942, the county court, at the instance of the plaintiff declared that the standard rent of the room which was then occupied by him as a separate dwelling was 3*s.* 8*d.* per week. This declaration was admittedly made under sub-s. 3 of s. 12 of the Act of 1920, as amended by s. 5 of the Act of 1938. It is common ground that, as from September 29, 1938, the standard rent of a controlled dwelling-house which forms part of another controlled dwelling-house is always to be fixed by apportionment and not in accordance with the unamended provisions of s. 12, sub-s. 1 (*a*), of the Act of 1920. Section 12, sub-s. 3, of the Act of 1920 provides that "Where for the purpose of "determining the standard rent or rateable value of any "dwelling-house to which this Act applies, it is necessary to "apportion the rent at the date in relation to which the standard "rent is to be fixed, or the rateable value of the property in "which the dwelling-house is comprised, the county court may, "on the application of either party, make such apportionment "as seems just, and the decision of the court as to the amount "to be apportioned to the dwelling-house shall be final and "conclusive." Section 5 of the Act of 1938 provides that "Where a dwelling-house to which the principal Acts apply is "part of another dwelling-house to which those Acts apply, "the standard rent of the first mentioned dwelling-house as "from September 29, 1938, shall be a standard rent ascertained "by apportioning the standard rent of the second mentioned "dwelling-house, and sub-s. 3 of s. 12 of the Act of 1920 "shall apply accordingly notwithstanding that the first "mentioned dwelling-house was let as a separate dwelling-"house on or before August 1, 1914, or on or before the date on "which the second mentioned dwelling-house was first let." It is to be observed that No. 119, The Grove, did not become a controlled dwelling-house until September 2, 1939, but the room which had been occupied by Mackenzie down to July, 1939, was probably a controlled dwelling-house under the earlier Acts, the standard rent being 11*s.* 6*d.* The room let to the plaintiff was not let on September 2, 1939, and was not again let so as to become a separate dwelling-house until May 25, 1940. The apportionment under the provisions mentioned was as, already stated, duly made on June 11, 1942.

The plaintiff's claim to recover the alleged over-payments is based on s. 14 of the Act of 1920, as amended by the provisions set out in the first schedule to the Act of 1939. The material words are " any sum . . . . which is by virtue of this Act " . . . . irrecoverable by ' the landlord ' ". To ascertain to what these words refer it is necessary to consider s. 1 of the Act of 1920 as amended by the first schedule to the Act of 1939. The defendant's contention is that the rent referred to in this section is the contractual rent agreed before the date of the control, and that, unless this contractual rent has been increased after the material date, the section has no operation. The main basis of this argument is that the words of the section to be construed differ from those to be found in s. 1 in the Act of 1915 in that the words " above the standard rent " in the last-mentioned section have been omitted from s. 1 of the Act of 1920. It is to be observed that the omission of these words leaves s. 1 of the Act of 1920 silent as to the criterion to be applied in deciding whether or not there has been an increase of rent. Strictly speaking, in a case where a standard rent is fixed under the Acts for a particular dwelling-house it is impossible legally to have another and higher rent for the same dwelling-house, and, if there is a standard rent in existence, it is impossible in the prima facie meaning of the words to have the rent of such dwelling-house increased, although, of course, the landlord and tenant may agree to increase it, and in that sense, if there is a contract to let at a rent higher than the standard rent after the date when the standard rent came into existence, it may be said that the rent has been increased since the material date. If the meaning for which the defendant contends be the true meaning of the section, the whole object of the Acts would appear to be defeated, for, although provision is made for the fixation of the standard rent, yet the difference between it and the agreed rent would not on the argument be irrecoverable because what is claimed to be the condition precedent of the Act, namely, the increase of the previous agreed rent to an agreed rent higher than the previous rent, would not be satisfied, and the standard rent referable to the dwelling-house in question would in substance be replaced by the agreed rent so long as the previous agreed rent was not exceeded.

In my judgment, the defendant's contention is incorrect. I think the phrase " where the rent of any dwelling-house to " which the Acts apply has been since September 2, 1939, or is " hereafter increased " can properly be construed as referring to an increase above the standard rent attached or attachable to the dwelling-house to be considered at the named date. Here the single room constituting the dwelling-house was not part of another controlled dwelling-house until September 2, 1939, and, consequently, until that date s. 5 of the Act of 1938 had no application, and the standard rent of the room was, I assume, the 11*s*. 6*d*. a week payable by Mackenzie. Section 5 of the Act of 1938 was brought into operation automatically on the whole dwelling-house becoming a controlled dwelling-house on September 2, 1939, by reason of the passing of the Act of 1939, and thereupon, although no apportionment was made, the standard rent of the room became 3*s*. 8*d*. a week because the subsequent apportionment in July, 1942, related back to that date, and, consequently, when the defendant agreed to let the room to the plaintiff for 10*s*. 0*d*. a week in May, 1940, the 10*s*. was then an increased rent having regard to the standard rent though the last-mentioned rent was only ascertained at a later date. I find myself in complete agreement with the judgment of the county court judge on the construction of the material section.

It was said that the point was a new one, but the decision in *Kimm* v. *Cohen* (1), seems to me to cover it. In that case, the plaintiff, in March, 1921, let three rooms in a house to the defendant at a weekly rent of 20*s*. At the time of the letting the standard rent of the three rooms had not been ascertained. In January, 1923, the plaintiff sued the defendant for 11*l*. arrears of rent. The county court judge held that the onus was on the defendant to prove the standard rent, and the hearing was adjourned to enable the defendant to obtain an apportionment under s. 12, sub-s. 3, of the Act of 1920. This was done, and on April 20, 1923, the apportioned rent was fixed at 11*s*. 7*d*. per week. The defendant counterclaimed for the difference between the 20*s*. and the 11*s*. 7*d*. over a period of eighty-six weeks, that is, from the date of the original letting to the date of the plaint. The county court judge held there could be no overpayment until the apportionment had been made, and he gave judgment for the plaintiff for the 11*l*. and dismissed the counterclaim. On appeal to the divisional court, of which Sankey and Talbot JJ. were the members, the court held that the apportionment operated retrospectively and that the defendant was entitled to recover the overpayments from the date when his tenancy started. No point appears to have been

(1) 40 T. L. R. 123.

made that the rent of 20*s.* was not an increased rent over any previous rent, but this does not affect the decision as to the retrospective effect of the apportionment.

For these reasons, I am of opinion that the appeal against the decision of the county court judge fails.

GODDARD L.J. [read by Luxmoore L.J.] In this case the plaintiff is a tenant of a room in a house belonging to the defendant, who herself is a lessee. Before September 1, 1939, the house was not subject to control. The room with which this action is concerned had, when the house was uncontrolled, been let at 11*s.* 6*d.* a week. The room was vacant on September 1, 1939, and in July, 1940, the room previously let at 11*s.* 6*d.* was let by the defendant to the plaintiff at 10*s.* Meanwhile, as the rateable value of the house was under 100*l.*, it had become controlled on September 2, 1939. After the plaintiff had been in occupation for some two years it occurred, or more probably it was suggested, to him to apply to have the standard rent of his room ascertained. Rooms in a controlled house are in a curiously favoured position. While the standard rent of the whole house depends on the contractual rent which was being paid on September 1, 1939, or, if not then let, on the rent obtained on a previous letting, or, if never before let, on the rent at which it was first let thereafter, the standard rent of rooms let as separate dwellings is, by s. 5 of the Act of 1938, to be ascertained simply by apportionment and without regard to rents paid on previous lettings or when the rooms were first let. The standard rent in this case turned out to be 3*s.* 8*d.*, and the plaintiff claimed the difference between the sum which he had paid and the amount he would have paid if the letting had been at the standard rent. The question raised depends on the construction of s. 1 of the Act of 1920 which, however, must be read in the light of s. 14 of the Act of 1920 and s. 5 of the Act of 1938.

Section 1, as amended in point of date by the Act of 1939, provides that where the rent has been increased since September 1, 1939, then, if the increased rent exceeds the standard rent, the amount of the excess shall be irrecoverable. The question is, increased beyond what ? Unlike s. 1 of the Act of 1915, the section does not say " increased beyond the " standard rent," and, if the section stood alone, I should have felt able to give effect to the argument submitted for the defendant, for the rent has not been increased since the material date. It has, in fact, been decreased from that which previously obtained, but previous rents have no bearing on the standard rents in the case of rooms. The tenant had the right to go to the court and get the standard rent fixed by apportionment, and there can be no doubt, I think, that, once the standard rent has been fixed, the tenant can not thereafter be required to pay more. The standard rent operates in rem as has more than once been held in this court. The effect of that is that the standard rent attaches from the moment when the house is brought under control. There was always from September 1, 1939, a standard rent applicable to the whole house, and there must, accordingly, always have been a standard rent attaching to any room which could be ascertained, though no one knew what it was until an application was made to fix it. Indeed, in *Kimm* v. *Cohen* (1), it was expressly held by a divisional court that the apportionment operates retrospectively, and, in my opinion, the decision was right. Therefore, it seems to me that anything over that sum is made irrecoverable, and we are bound to read s. 1 of the Act of 1920 in the same way as did the county court judge with whose careful reserved judgment I feel constrained to agree. Like him I feel the decision imposes a great and unmerited hardship on the defendant. That in letting this room at a reduced rent it ever occurred to her or to the plaintiff that she was doing anything forbidden by this legislation, I do not suppose could be suggested. Looking at the Act of 1939 as a whole, I think its object was to stabilize rents at the figures then existing, and I cannot help thinking that, being passed in the hurry that it was with a very large number of other Acts when war was imminent, the position with regard to rooms separately let in controlled houses was overlooked. The extraordinary result seems to follow that, had the former tenant, who was paying 11*s*. 6*d*., remained in occupation, he could, directly control was imposed, have gone to the court and got the standard rent of his room fixed, with the result that the contractual rent would have been reduced by about two-thirds. Counsel for the plaintiff said that, if the former tenant had remained in possession he could not have refused to pay his contractual rent, but I cannot see why he should not have made the application to fix the standard rent, nor why, if he had, his rent would not have thus been cut down. These Acts are as difficult and complicated as any on the statute book, and people who let rooms or small houses and are often

(1) 40 T. L. R. 123.

themselves in quite a humble station of life find to their cost that they are engaged in a perilous business. They cannot be expected to know all the provisions of these Acts or to understand them if they do know of them, and in the present case a woman whose good faith is in no way assailed finds herself suddenly called on to repay something like two-thirds of the rent she has been receiving from her lodger over a period of two years at least, and is, moreover, obliged to keep him at his reduced rent, which she probably would never have agreed to accept. I cannot think that Parliament ever contemplated such a state of affairs, but, if this be the result of the legislation, the courts cannot refuse to give effect to it.

Appeal dismissed.

Solicitors for defendant: *King and Corbyn.*
Solicitors for plaintiff: *Parker, Thomas & Co.*

P. B. D.

In re AFFAIRS OF KIRBY.

C. A.
1943
Nov. 2, 3;
Dec. 15.

Emergency legislation — Liabilities adjustment — Order allowing debtor to remain in possession of property — Order extending after end of lease—Validity—Right of landlord to rent—Liabilities (War-Time Adjustment) Act, 1941 (4 & 5 *Geo.* 6, *c.* 24), *s.* 8, *sub-s.* 1 (*a*).

A debtor carried on the business of a boarding-house at premises which she occupied under two leases which were due to expire on March 25, 1943. Owing to war conditions she was unable to pay her rents after September, 1939, and on April 26, 1940, the landlord obtained judgment for possession and arrears of rent. He took no steps to execute his judgment until April 23, 1942, when he obtained leave under the Courts (Emergency Powers) Acts to enforce it, the debtor having meanwhile remained in possession without paying any rent. On September 24, 1942, the debtor obtained a protection order under the Liabilities (War-Time Adjustment) Act, 1941, which had the effect of suspending the execution of the landlord's judgment for possession. On March 23, 1943, the county court judge made an adjustment order providing (inter alia) that the landlord should be at liberty to enforce his judgment for possession after May 1, 1943. The debtor was thus permitted to remain in possession after the leases had expired by effluxion of time. On appeal by the landlord:—

Held, (1.) that the county court judge had no jurisdiction to extend the debtor's occupation of the premises beyond the term of the leases; and (2.) that when the adjustment order was made provision should have been made for securing to the landlord

C. A.

1943

AFFAIRS OF KIRBY, *In re.*

the rent of the premises from the date of the protection order until the expiration of the leases.

APPEAL from Bloomsbury county court.

The debtor, Mrs. Kirby, carried on the business of a boarding-house keeper at Nos. 12, 13, 28 and 29 Montague Street, Bloomsbury, under two leases for fourteen years, expiring on March 25, 1943, at rents of 450*l.* and 435*l.* per annum. She paid her rents punctually up to the commencement of the war, but since September 30, 1939, she had not paid any rent. On April 26, 1940, the landlord obtained judgment against the debtor for possession of the premises and arrears of rent, but he took no steps to execute his judgment until April 23, 1942, when he obtained leave under the Courts (Emergency Powers) Acts to enforce his judgment, the debtor having meanwhile remained in possession without paying any rent. On September 24, 1942, the debtor applied for and obtained a protection order under the Liabilities (War-Time Adjustment) Act, 1941, which had the effect of suspending the execution of the landlord's judgment for possession. Under the protection order the affairs of the debtor were referred to the liabilities adjustment officer for report. On January 23, 1943, the adjustment officer recommended the realization of certain assets of the debtor and the payment of the priority creditors. On March 23, two days before the leases were due to expire, the county court judge considered the report and made an adjustment order in accordance with the officer's recommendations, but also providing that the landlord should be at liberty to enforce his judgment for possession after May 1, 1943. This last provision left the debtor in possession of the premises after the leases had come to an end by effluxion of time. On April 7, the landlord applied for a stay of the adjustment order on the ground that it made no provision for securing the payment of rent since the date of the protection order, as required by s. 8, sub-s. 1, of the Liabilities (War-Time Adjustment) Act, 1941 (1). The application was heard on

(1) Liabilities (War - Time Adjustment) Act, 1941, s. 8, sub-s. 1: "Where the court "exercises its powers so as to "allow the debtor to remain in "possession of any property, or "postpones the realisation of any "property, it shall make provision "in the liabilities adjustment "order for securing the payment "of any sums payable by the "debtor in respect of the property "after the date of the protection "order, subject to any variation "of any lease . . . . affecting the "property made by or under this "Part of this Act, and in par-"ticular for securing: (*a*) the "payment of rent . . . ."

May 4 and was refused, as also was an application by the debtor for an extension of time. The landlord appealed, and pending the hearing of the appeal, the distribution of the debtor's assets and the further consideration of the adjustment order were adjourned.

C. E. Rochford for the landlord. The leases expired on March 25, 1943, by effluxion of time, and, further, had been put an end to by the judgment for possession obtained on April 26, 1940, and the debtor became a trespasser after those dates. The county court, therefore, in making the adjustment order of March 23, 1943, and allowing the debtor to remain in possession until May 1, 1943, was exercising "its powers" to allow the debtor to remain in possession, and was bound, under s. 8, sub-s. 1, of the Act, to make provision in the order for securing the payment of the rent from the date of the protection order. [GODDARD L.J. If a tenant remains in possession after the lease has expired the Courts (Emergency Powers) Acts will not apply as he is a trespasser and his remaining in possession is a tort. It is very doubtful whether the county court judge had any power to make an order allowing the tenant to remain in possession till May 1.] On the assumption that the court had power to make the order extending the possession of the tenant, s. 8, sub-s. 1, came into operation, and the county court should have directed that the agreed rent should be paid as from the date of the protection order.

Valentine Holmes for the liabilities adjustment officer. The object of the Act is that, in a case of insolvency resulting from war conditions, there should be a "gentleman's bankruptcy." The county court is given power to allow the debtor to retain sufficient assets to enable him to live and also to give him a chance to recover his business. Section 8, sub-s. 1, which provides what is to happen "where the court exercises its "powers" applies only when the court is making a liabilities adjustment order, and not when it is making a protection order. The Act, from s. 4 onwards, is dealing with the powers of the court when making a liabilities adjustment order. It is not obligatory on the court under s. 8, sub-s. 1, to make provision for the payment of the whole of the rent which has accrued since the making of the protection order. Section 8 does not deal with mesne profits, which are not a sum for use and occupation,

C. A.
1943
AFFAIRS OF KIRBY, *In re.*

but a sum for trespass. The sums mentioned in the section are all contractual, with the exception of rates and taxes, which are statutory and do not include damages in the nature of mesne profits which are not provable debts within s. 17. The county court judge was not purporting to exercise a power to allow the tenant to remain in possession up till May 1, 1943. He was purporting to remove a restriction on the landlord which prevented him from exercising his right to recover possession of the premises.

Rochford replied.

Cur. adv. vult.

Dec. 15, The following judgments were read :—

SCOTT L.J. This appeal raises questions of importance relating to the extent to which the rights and obligations of landlord and tenant are modified, or subject to alteration, under the Liabilities (War-Time Adjustment) Act, 1941. The respondent, Mrs. Kirby, is the debtor, and I will refer to her as that. The appellant is the twelfth Duke of Bedford, to whom, with his predecessor, the eleventh Duke, I will refer as " the " lessor." It is necessary to consider the general scheme of the Act, and several of its sections, but the main question turns on the proper interpretation of s. 8, sub-s. 1, of the Act.

His lordship stated the facts, read the sub-section, and continued : Mr, Rochford, both below and before us, contended (1.) that the court had, by the protection order, so exercised " its powers " as to allow the debtor to remain in possession of all four houses from the date of the protection order until the date when she went out ; or, alternatively, (2.) that, by the liabilities adjustment order of March 23 and later orders, it had done so ; and (3.) that, under the above sub-section, the court was compelled to direct payment to the lessor of the arrears of rent or mesne profits which had accrued due. In the course of the hearing a question was raised, I think by the court, whether the debtor should be regarded as having any title to the land or as being a mere trespasser as from various alternative dates, and this suggestion involves a consideration of the Liabilities (War-Time Adjustment) Act as a whole. Mr. Valentine Holmes, appearing on the instructions of the Treasury Solicitor for the liabilities adjustment officer, who had been, with his consent, made a party to the appeal, I understood to support the orders of the court as made. The interpretation of the Act in its bearing on the present issues is far from easy, and, although I have arrived at definite conclusions, I confess to a lingering doubt about one. I think the most helpful approach is to consider first, the scope and application of the word " powers " in the sub-section, and that throws one straight on to the whole conception of the functions of the court as indicated in the Act.

It is common knowledge that the passing of the Act was due to the difficulty the courts felt in administering the " merciful " jurisdiction of the Courts (Emergency Powers) Acts without causing unintended hardships to creditors and others not before the court, who were likely to be affected by the reliefs given by the courts to debtors needing protection or indulgence. It was often felt by the courts that bankruptcy was, on balance, the better form of relief, just because relief could there be given to the bankrupt without causing so much hardship to other sufferers from the debtor's impecunious position. The Liabilities (War-Time Adjustment) Act, 1941, was intended to be a middle course allowing relief to debtors in alleviation of pecuniary misfortunes caused by the war, while observing that equality of consideration for creditors, which is characteristic of bankruptcy administration, without imposing the stigma of bankruptcy on the debtor.

The functions and powers under the Liabilities (War-Time Adjustment) Act, 1941, wisely entrusted to the county courts because of their bankruptcy experience, are in many ways analogous to those in bankruptcy, but they also necessitate the exercise of the emergency powers of the High Court under the Courts (Emergency Powers) Acts, and in that I regard the provisions of s. 3, sub-s. 2 (*c*), and s. 6, sub-s. 1, as specially fundamental, as they give the county court all the powers of the High Court under those Acts. The essential features of bankruptcy jurisdiction are conferred by ss. 3 to 13 inclusive. In the former jurisdiction are two features of peculiar relevance to the present appeal. By the Courts (Emergency Powers) Act, 1939, both legal proceedings and measures of self-help available to landlords for recovery of rent or of possession of land for non-payment of rent are forbidden without leave of the court, and the effect of that Act was to create in the tenant a quasi-right to possession and to immunity from rent or mesne profits which continued so long as the court did not give the landlord leave to proceed by either road—courts or self-help.

By the Act of 1940 this resultant semi-title or semi-immunity was carried a little nearer towards the establishment of something like a real statutory right in the tenant, for the Courts (Emergency Powers) Amendment Act, 1940, s. 1, sub-s. 1, was as follows: "Where an application is made by the lessor " . . ., for leave to exercise any of the rights and remedies " mentioned in sub-ss. (1), (2) and (3) of the principal Act " being a right or remedy arising in consequence of a default in " the payment of *rent or mesne profits* . . . the appropriate " court . . . . shall not make the leave conditional on any " default in the payment of rent or *mesne profits* falling due " after the date of the hearing of the application." Sub-s. 2 carried the aspect to which I am referring still further: "Where the . . . court . . . refuses leave . . . to enforce a " judgment or order for the recovery of possession . . . in " default of payment of rent . . . the lease shall be deemed " not to have been forfeited and *shall continue in force* so long " as the judgment or order remains unenforceable, but no " longer." Whether those sub-sections apply to a tenancy agreement as well as a lease, it is, in the present case, unnecessary to inquire as we are only concerned with leases. Now comes a very important link between the two branches of " relief " legislation which ties them together. As I have already said, s. 3, sub-s. 2, para. (*c*), of the Liabilities (War-Time Adjustment) Act, 1941, makes the liabilities adjustment court the court for those Acts with all the powers of the court under those Acts.

But there are two further points. The refusal of leave under those Acts causes a lease to continue to exist, *as a lease*, when, but for the act of the court, it would have ceased to operate. Secondly, mesne profits, though at common law mere damages for retaining unlawful possession, seem to be treated as a debt on a parity with contractual rent accrued or accruing due by reason of the statutory extension of the lease. It should also be observed that para. (*c*) of s. 3, sub-s. 2, of the Liabilities (War-Time Adjustment) Act, 1941, is in a part of the section relating to the exercise of " powers " to make a protection order and to the legal results of such an order. This operative effect of a protection order is considered also in s. 6, sub-s. 1, which provides for its inclusion in a liability adjustment order, and is there expressly applied, not only to leases, but also to a " holding over " by virtue either of the Rent Restriction Acts or of the Courts (Emergency Powers) Acts.

C. A.
1943
AFFAIRS OF KIRBY, *In re.*
Scott L.J.

The result is that the county court seems, at first sight, to be authorized to keep a debtor in possession after his contractual right to possession has ceased even by the expiration of the term of his lease. At first I was inclined to think that that inference was justified by the references to "mesne profits" and "holding over," but Goddard L.J.'s judgment, which I have read, has convinced me that that inference would be erroneous. I agree with him that the interference by the Courts (Emergency Powers) Act, 1939, with a landlord's contractual and common law powers is limited to the term during which, but for the Act, they could operate uncontrolled, and that the court is given no power to convert a mere trespass into a rightful possession in the sense of making it cease to be tortious. The Act expressly excludes proceedings in tort from its purview. This aspect of the Courts (Emergency Powers) Acts was emphasized by this court in *Butcher* v. *Poole Corporation* (1). For these reasons I think the county court's order of March 23, 1943, that the debtor might remain in possession, was only valid for the two days to March 25, when the leases came to an end by effluxion of time. From then onwards the court had no power to allow the debtor to remain in possession. The consequence is that the duty imposed on the court by s. 8 of the Liabilities (War-Time Adjustment) Act, 1941, to order payment of the rent extended only down to that date, for from then onwards the court had no power which it could exercise within the opening words of s. 8, sub-s. 1: "where the "court exercises its powers so as to allow the debtor to remain "in possession of any property." The exception or condition imposed by the words "subject to any variation of the "lease . . . . made by or under this part of this Act" refers, for instance, to s. 6, sub-s. 1, which permits a reduction of the contractual rent in the discretion of the court within certain limits. Had the rents of the demised premises been so reduced, the amount payable to the lessor under s. 8, sub-s. 1, would have been at the reduced rate. Apart from any such reduction or any postponement of payment under the Courts (Emergency Powers) Acts, or this Act, s. 8, sub-s. 1, in my view, makes it obligatory on the court to order payment of the contractual rent, including arrears, at the rate of 450*l.*, and 435*l.* per annum respectively, as from September 25, 1942.

In my opinion, the language of s. 8, sub-s. 1, is quite clear and unambiguous, but, if there be any doubt, I should point to

(1) [1943] K. B. 48.

two supporting considerations. The first is the power conferred on the court by s. 6, sub-s. 1, to reduce the landlord's rent if fairness to other creditors or to the debtor requires it, although this power is limited to the case of the tenancy being preserved under the Courts (Emergency Powers) Act, or by the Rent Restriction Acts. The second is that, as a lessor is not *technically* a secured creditor, Parliament may well have thought it only fair to him, if he is by war-time legislation to be deprived of the special remedies that the ordinary law allows him, that he should be given the special consideration of s. 8, sub-s. 1, to mark the difference of his position from that of the really unsecured creditor.

For these reasons I think s. 8, sub-s. 1, should be construed as I read it, and that the appeal should, to that extent, succeed. The payment of rent should only be down to March 25, 1943. I would add that this court greatly welcomes the assistance of treasury counsel in cases where the liabilities adjustment officer is a party to the appeal.

MACKINNON L.J. As I might say in Scotland, I agree with the judgment of his Lordship in the chair, and I also agree with the judgment of Goddard L.J., which I am about to read.

GODDARD L.J. For convenience I will recapitulate the essential matters and dates. The judgments for possession, which were based on forfeiture for non-payment of rent, were given on April 26, 1940. Leave to proceed on these judgments was given on April 23, 1942. On September 24, 1942, the debtor applied to the court for the adjustment and settlement of her affairs under the Act, and a protection order was made on the same day. The report of the liabilities adjustment officer was made on January 23, 1943. On March 23, 1943, the court made an adjustment order and therein provided that the landlord night enforce his judgment for possession on or after May 1, 1943. On March 25, the term for which the two leases had originally been granted expired. On April 7 the landlord applied to the court to stay the order of March 23, on the ground that it made no provision for securing payment of the rent as required by s. 8, sub-s. 1, of the Act. At the same time the debtor applied for a further extension of time for giving possession. On May 4, both these applications were refused. The distribution of the debtor's assets and the further consideration of the whole matter of the adjustment order were stayed till after the hearing of this appeal by the landlord, who contends that the court was bound to provide in the order for payment of his rent or mesne profits.

I think it is necessary, and it will, at least, be of assistance, to consider in what capacity the debtor held over, or must be regarded as having held over, after the judgment. The first period is from April 26, 1940, to September 24, 1942. During the whole of that period, in my opinion, she must be regarded as a tenant at sufferance. Had an application been made during that period for leave to proceed and leave been refused, the lease would have been deemed to be continuing for so long as the judgment remained unenforceable: Courts (Emergency Powers) Act, 1940, s. 1, sub-s. 2, now replaced by Courts (Emergency Powers) Act, 1943, s. 3, sub-s. 2; but when application for leave to proceed was made it was granted, so leave never was refused, and, consequently, the leases were never during this period preserved by those Acts. From April 23, 1942, to September 24 of that year, the debtor was a tenant at will, or, perhaps, on sufferance. At any moment the landlord might have sued out a writ of possession and recovered the land. On the making of the protection order the tenant remained in possession by virtue of the Act, because the order automatically stayed execution: see s. 3, sub-s. 2. The effect of this seems to be that the parties were back into the same position as in April, 1940. The landlord had a judgment, but he could not proceed to execution without leave. The protection order contained no special reference to the leases, and at this time the debtor was not holding over by virtue of the Courts (Emergency Powers) Act, so s. 6, sub-s. 1, of the Adjustment Act did not apply to the position. But, as the court did deal with the leases in the adjustment order, that must, in my opinion, be regarded as operating retrospectively, so that the leases must be deemed to have been continuing in force. I say this because the county court under s. 3, sub-s. 2 (*c*), becomes the court for the purpose of giving leave to proceed, and as, on March 23, it in effect refused leave to proceed till a later date, I think the leases must be considered to have remained in force by virtue of the section in the Courts (Emergency Powers) Act to which I have referred above. From September 24, 1942, therefore, the debtor remained in possession as a tenant under the leases which had become revived, the appropriate court having refused leave to enforce the judgment. It is curious that this situation should result simply because of the great consideration, indeed generosity, shown by the landlord to the debtor. Had he proceeded to execute his judgment when he obtained leave in April, 1942 (and there is no reason to suppose that he might not have got leave, if he had asked for it, much earlier), the present state of affairs would not have arisen, and it may be that it will discourage landlords from behaving with such consideration in future, but with this we have nothing to do.

The immediate question for our decision arises under s. 8, sub-s. 1, and the above analysis of the position seems to me to show that it was by reason of the court making the protection order that the debtor remained in possession of the property in question. I am unable to see anything that obliges us to read the words " exercises its powers " in the section as referring only to the making of the adjustment order. The court is not bound to make a protection order merely because it is asked to do so. The court has to be satisfied that a prima facie case for one is made out, but as soon as it does make the order the effect is to keep the debtor in possession unless and until the court otherwise orders. The court is then bound to make provision in the adjustment order for securing payment of sums payable by the debtor in respect of the property after the date of the protection order, and, in my opinion, those sums are rent, because the leases were revived.

Now, however, comes the question of the period for which, in this case, the sum is payable. It begins with the date of the protection order, September 24, 1942, and if the court had power to continue the debtor in possession till May 1, 1943, that would be the period. But whether the court had this power is, I think, a question of considerable difficulty, because the term of the leases expired on March 25, 1943. First, let us consider the position under the Courts (Emergency Powers) Act. That Act does not give the court power to stay execution where a landlord obtains a judgment against a tenant whose term has expired by effluxion of time. It operates only, as far as recovery of land is concerned, where possession is claimed by reason of non-payment of rent. Suppose, then, an action brought in 1942 for the recovery of land based on forfeiture for non-payment of rent in the case of a lease, the term of which, but for the forfeiture, would expire on March 25, 1943. (I am assuming, of course, that it is not a house to which the Rent Restriction Acts apply.) The landlord gets judgment, but the court refuses leave to proceed. The lease then is deemed not to have been forfeited and continues in force so long as the judgment remains unenforceable. But, in my opinion, this Act is not intended to extend the lease beyond the term for which it was granted. It is not intended to create a statutory tenancy of the nature created by the Rent Restriction Acts. If a tenant holds over after his lease has expired, against the will of the landlord, he is a mere trespasser. His possession is tortious, and the Courts (Emergency Powers) Act would have no application to any judgment obtained in these circumstances. The whole scope of the Act is to deal with inability to pay money or perform obligations by reason of war conditions and circumstances. In this connexion I would refer especially to *Butcher* v. *Poole Corporation* (1).

In my opinion s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1940, must be read as meaning that the lease is to continue as though it had not been forfeited so long as the order refusing leave to proceed remains in force, but cannot be regarded as extending the term granted by the lease. Accordingly, when in the case supposed, March 25, 1943, arrived, in my opinion the landlord could then issue a writ claiming possession, and it would be no objection to that action that leave to proceed in the previous action for forfeiture had been refused. To hold otherwise would be to increase the scope of the Act and make it applicable to judgments in actions for tort. Exactly the same considerations should apply, in my opinion, to the Liabilities (War-Time Adjustment) Act. Its title and its whole structure show that its object is the arrangement, adjustment and settlement of the affairs of persons financially affected by the war. Financial embarrassment cannot by any process of thought be said to have any relation to trespass on another's property, even where the trespass is the failure or refusal to go out on the expiration of a term of years. The scope of the Act is wider, no doubt, than the Courts (Emergency Powers) Acts, because it operates to stay execution in respect of any judgment, and so would apply to a judgment for damages recovered in respect of a tort. That judgment would constitute a provable debt as it would in bankruptcy.

The words in s. 3, sub-s. 2, of the Liabilities (War-Time Adjustment) Act, 1941: "for the recovery of possession of "land" are immediately followed by "or of goods let under "a hire-purchase agreement," and this seems to me strongly to point to the fact that what the legislature had in mind was recovery of possession of land for non-payment of rent. In respect of goods there is no prohibition against bringing an ordinary action of detinue. What is prohibited is the recovery of goods under a hire-purchase agreement where the right to recover the goods usually, though admittedly not invariably, arises owing to the non-payment of money. Otherwise, a financially embarrassed squatter could hold up proceedings taken against him by a dispossessed owner, at least temporarily, by going to the court ex parte and making out a case that his financial troubles were caused by the war and getting a protection order, which would stay the action of trespass. Even if the section does effect a stay of proceedings against one who is a trespasser, in my opinion the court, when making an adjustment order, has no jurisdiction to extend the debtor's occupation of the property beyond the terms of the lease. It follows that the court ought not to have protected the debtor beyond March 25, 1943, and, consequently, the order ought to be varied in that respect. Provision ought also to have been made for securing the rent from September 24, 1942, to March 25, 1943, but not for any longer period. For any period after that date, during which the debtor remained in possession, the landlord can pursue any remedy the law gives him. As the rent under the two leases amounted to 885*l.* per annum it follows that the sum to be secured is about 445*l.*, as it is for a period of just over six months. This being the result, I think the whole case ought to be remitted to the county court judge for further consideration, because, as an adjustment order will have to provide for this payment to one creditor in addition to the amount of his provable debt for arrears of rent and mesne profits under the judgment, and for rent during the time the debtor was a tenant on sufferance, it may be that he will consider that it is not practicable or proper to make an order. I do not mean to indicate any opinion whatever whether he should or should not, but I think Mr. Holmes was justified in saying that this was a possibility that we ought not to ignore, and that, therefore, the case should be sent back for further consideration in the light of the judgment of this court.

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(1) [1943] K. B. 48.

Appeal allowed.

Solicitors for landlord: *Taylor & Humbert.*
Solicitor for liabilities adjustment officer : *Treasury Solicitor.*

A. W. G.

C. A.

1944
Jan. 14.

KENNEDY *v.* WALKER.

Workmen's compensation—Failure of common law claim—Application by plaintiff in county court to assess compensation—Election—Right of appeal from judgment in common law action—Crown servant—Agreement to treat named individual as employer—Workmen's Compensation Rules, 1926 (*St. R. & O.*, 1926, *No.* 448), *r.* 95; *Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 29, *sub-s.* 2.

The plaintiff was employed in the service of the Crown, and suffered injury from an accident arising out of and in the course of her employment. It was agreed that the defendant should be treated as her employer, and she brought an action against him at common law in the county court. That action failed, and the plaintiff applied to the county court judge to assess compensation under the Workmen's Compensation Act, 1925. He did so, but the certificate was not drawn up. The plaintiff then appealed in the common law action:—

Held, on a preliminary objection by the defendant, that the plaintiff, by applying to the county court judge to assess compensation had elected to take compensation, and could no longer appeal in the common law action:—

Held, also, that the defendant, having agreed to be treated as her employer, was to be so treated for all purposes, and that the award was rightly asked against him personally, the provisions of r. 95 of the Workmen's Compensation Rules, 1926, as to claims against the Crown being inapplicable.

Neale v. *Electric and Ordnance Accessories Co., Ld.* [1906] 2 K. B. 558 followed.

Appeal from Westminster county court.

The plaintiff, Mrs. Kennedy, was employed in the service of the Crown at the Ministry of Supply. She sustained personal injury in the building where she was employed, and it was agreed that the defendant, Walker, should be treated as her employer for the purpose of an action which she brought in the Westminster county court claiming damages at common law for negligence. That action having failed, the plaintiff asked the county court judge to assess compensation under s. 29, sub-s. 2, of the Workmen's Compensation Act, 1925, and he awarded her forty-one weeks' compensation, but did not draw up the certificate. The plaintiff then appealed against the dismissal of her common law action.

B. J. M. MacKenna, for the defendant, took a preliminary objection. The plaintiff, by applying for an award of com-

C. A.
1944
KENNEDY
v.
WALKER.

pensation in the county court, has made her election to take compensation, and she cannot now appeal in the common law action: *Neale* v. *Electric and Ordnance Accessories Co., Ld.* (1).

Platts Mills for the plaintiff. There is no concluded election, for the certificate has not been drawn up. It is the certificate which has the effect of an award, and till the award is made there seems, on the cases, to be no election. [He referred to *Harrison* v. *Wythemoor Colliery Co., Ld.* (2).] Moreover, the award, if made against the defendant, would be bad on the face of it. The plaintiff is in the service of the Crown, and, therefore, by r. 95 of the Workmen's Compensation Rules, 1926 (St. R. & O., 1926, No. 448), proceedings are to be brought against the head of the department, who is not Mr. Walker, but the Minister of Supply.

LORD GREENE M.R.: In my opinion, the preliminary objection prevails. Under the earlier enactments the only court that could assess compensation under what is now s. 29, sub-s. 2, of the Workmen's Compensation Act, 1925, was the court in which the common law claim was tried. The well-known hardships to which that exposed the workman were remedied (perhaps only partially) by the alteration now to be found in sub-s. 2, under which not merely the trial court, but an appellate tribunal can assess and award compensation. That enables the workman to postpone his election until he gets to the appellate court, and his right of appeal is to that extent safeguarded. It was settled years ago in *Neale* v. *Electric and Ordnance Accessories Co., Ld.* (1), under the old law that a workman who had exercised his option by asking the trial judge to assess compensation could not then appeal. That has been recognized ever since.

In the present case the plaintiff, instead of waiting until she got to this court and availing herself of the better position offered to her under s. 29, sub-s. 2, of the present Act, chose to make an application in the county court itself and obtained an assessment. It seems to me impossible to say that, on these facts, the option to proceed under the Workmen's Compensation Act has not been exercised. Indeed, the only point on this branch of the argument relied on by Mr. Platts Mills was the fact that the plaintiff had not actually obtained

(1) [1906] 2 K. B. 558.

(2) [1922] 2 K. B. 674.

a certificate. It is the certificate which has the force of the award, but the question is not whether she has obtained a certificate, but whether she has exercised her option, and it seems to me impossible to say that the fact that she has not chosen to take up a certificate embodying the assessment for which she applied shows that she has not elected. What she wishes to do is to get the best of both worlds: to be able to say in this court: "I have not elected to pursue my Workmen's "Compensation remedy under s. 29, sub-s. 2," and then, if she fails in her appeal on the common law claim, to be able to fall back on the certificate. I cannot imagine a stronger case of a perfectly clear continuing election than the present one. Whether if, before the assessment was made, she had changed her mind, and said to the judge: "I no longer "require an assessment," that would have been regarded as an election is a totally different question. If she had taken that course, it may very well be that she would not have been regarded as having elected. In the same way in a case in this court it was held that where an action had been discontinued, that was not, in the circumstances of the case, an election to pursue the common law remedy. That sufficiently disposes of that argument.

There was another argument, the object of which was to suggest that the assessment is void, that the judge had no jurisdiction to make it, and that the certificate would be void if it were given. That is based on the point that the plaintiff was a servant of the Crown, and that the only way in which a servant of the Crown can obtain compensation against the Crown is by making a claim under r. 95 against the head of the department, who in this case would be the Minister of Supply. That seems to me to be beside the point. Mr. Walker agreed to accept the position of employer, and that agreement, in my opinion, means "employer for all "circumstances relevant to the proceedings," and must include the consequential application under s. 29, sub-s. 2, which everybody must have realized was likely to be made in the event of the action failing. To say that the agreement to be treated as the employer is to be limited to the common law claim and is to exclude any consequential application under the Workmen's Compensation Act would, in my opinion, be putting an entirely unbusinesslike construction on a very sensible arrangement. Nobody suggested at the time that any such limited construction could be put on it and, in my

C. A.
1944
KENNEDY
v.
WALKER.
Lord Greene
M.R.

opinion, there is nothing in the point. Mr. Walker is a private individual for this purpose, and if and when execution had to be levied under a judgment or under a certificate it would be against him as an individual. The action of the Crown, no doubt, would be, according to its usual practice, to indemnify him because he is the Crown's servant. As a matter of law, it is a pure claim against an individual alleged and admitted to be the employer and accepted as the employer for all purposes relevant to these proceedings. The appeal fails on the preliminary point.

MacKinnon L.J.: I agree.

du Parcq L.J.: I agree.

Appeal dismissed.

Solicitors for plaintiff: *White & Co.*
Solicitor for defendant: *Treasury Solicitor.*

J. W. H.

BRITISH DOUGHNUT COMPANY, LIMITED *v.* DALE.

1943
Oct. 15.

Food and drugs—Sale of milk substitute by retailer with label calculated to mislead—Offence due to act or default of manufacturers—Direct prosecution of manufacturers—Previous conviction of manufacturers under same sections of Act—" Subsequent offence "—Food & Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 79, *s.* 83, *sub-s.* 3.

In June, 1942, a retailer sold milk substitute with a label calculated to mislead, contrary to s. 6 of the Food & Drugs Act, 1938. The authority concerned, being satisfied that the offence was due to the default of the manufacturers, prosecuted them for it under s. 83, sub-s. 3, of the Act, and they were convicted. In December, 1941, they had been convicted in respect of a similar label under the same section of the Act:—

Held, that the offence of which the appellants had been convicted was a " subsequent offence " to that committed by them in December, 1941, within s. 79 of the Act under which an increased penalty was imposed.

Case stated by Wareham, Dorset, justices.

At a court of summary jurisdiction sitting at Wareham on September 17, 1942, the appellants, the British Doughnut Co., Ld., were charged under s. 6 of the Food and Drugs Act, 1938, " for that you on June 8, 1942 . . . . did give "with certain food, to wit, 'Milhona,' then sold by you by "the hand of Ivy Loveday acting for Herbert Smith of "St. George's Road, Bovington Camp . . . to Kenneth "Batson Dale, the purchaser thereof, a label which was "calculated to mislead as to the nature, substance and quality "of the said food."

On June 8, 1942, the respondent, K. B. Dale, the sampling officer of the Dorset County Council, purchased from Ivy Loveday, an assistant in a shop at Bovington, near Wareham, of which Herbert Smith was the proprietor, half a pound of powder from a carton labelled "Crowson's Milkona." On the carton was a label containing the words: "Milkona completely "replaces milk or milk powder for all baking purposes." Miss Loveday handed the half pound of powder taken from the carton to the respondent in a bag with a leaflet containing the above words, and he paid her 1*s.* 6*d.* The requisite statutory requirements were carried out by the respondent, and the public analyst certified that the portion of "Milkona" submitted to him did not resemble dried milk powder in its chemical composition, and, moreover, that the chemical composition of the liquid made from the powder bore no resemblance to that of milk. The justices found that the statement on the carton was calculated to mislead.

The "Milkona" from which the half pound was taken was bought on October 7, 1941, by the said Herbert Smith from Herbert Threadkell, Ld., who, on September 11, 1941, had bought it from Crowsons & Son, Ld., who, on September 9, 1941, had purchased it from the appellants, who were the manufacturers. In each case the powder was sold in sealed packets bearing the said label, and it was sold by Miss Loveday in the same condition as when Herbert Smith received it. The appellants knew that the "Milkona" was purchased for distribution to the public.

The appellants were charged by reason of the provisions of s. 83, sub-s. 3, of the Food and Drugs Act, 1938, which provides: "Where it appears to the authority concerned that an offence "has been committed in respect of which proceedings might "be taken under this Act against some person and the "authority are reasonably satisfied that the offence of which "complaint is made was due to an act or default of some "other person and that the first-mentioned person could "establish a defence under sub-s. 1 of this section [i.e. that "his contravention of the Act was due to an act or default "of another person], they may cause proceedings to be taken "against that other person without first causing proceedings "to be taken against the first-mentioned person."

The appellants had been convicted at Enfield, on December 8, 1941, of an offence in respect of the label on "Milkona" under the same sections of the Act. The justices convicted the appellants, and, holding that the offence on June 8, 1942, of which they were convicted under s. 83, sub-s. 3, was a "subsequent offence" to that committed on December 8, 1941, within the meaning of s. 79 of the Act 1938 (1), ordered them to pay an increased fine of 50*l*.

Havers K.C. and *C. E. Rochford* for the appellants. This was not a "subsequent offence" within the meaning of s. 79 of the Act. Only the acts of the appellants themselves should be considered, and not those of Miss Loveday, who was in no sense their agent. Therefore, any offence which they committed was committed on September 9, 1941, when they sold the powder to Crowsons & Sons, Ld. Section 83, sub-s. 3, of the Act does not create a substantive offence. It is only procedural. The same reasoning applies to the sale on June 8, 1942.

Scott Henderson, for the respondent, was not called on to argue.

VISCOUNT CALDECOTE C.J. [having dealt with contentions of the appellants which do not call for report]: The other point which remains is whether this was a "subsequent "offence" within the meaning of s. 79 of the Act. Acts of Parliament often lead to results which were not anticipated. I do not find it necessary to say whether or not the position created in the present case was anticipated by Parliament when this Act was passed. An offence was committed by the appellant, in December, 1941. The present charge was of an offence, under the provisions of s. 83 of the Act, committed on June 8, 1942. That seems to me all that need be said to show that this latter offence was clearly a "subsequent "offence." It was subsequent within the principles laid down in *Rex* v. *South Shields Licensing Justices* (2) in which it was held in a prosecution under the Licensing Act, 1872, that a "subsequent offence" in s. 3 meant an offence under the same section as was applicable to the previous offence. Here the offences of December, 1941, and June, 1942, were both against s. 6 of the Act of 1938. The appeal must be dismissed.

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(1) By s. 79 of the Food & Drugs Act, 1938: "A person guilty of an "offence under this Act shall ". . . . be liable in the case of a "first offence, to a fine not exceeding 20*l*. and, in the case of "a subsequent offence, to a fine "not exceeding 100*l*. . . . ."

(2) [1911] 2 K. B. 1.

CHARLES J. I agree.

HALLETT J. I agree.

Appeal dismissed.

Solicitors for appellants: *Durrant Cooper & Hambling.*

Solicitor for respondent: *C. P. Brutton, county solicitor, Dorchester.*

W. L. L. B.

SIMMONDS AEROCESSORIES (WESTERN), LIMITED, *v.* PONTYPRIDD AREA ASSESSMENT COMMITTEE AND ANOTHER.

1943
Nov. 16, 17;
Dec. 21.

Rates—Derating—Industrial hereditament—Canteen for employees of factory—Factory & Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149, *sub-s.* 1—*Rating and Valuation* (*Apportionment*) *Act,* 1928 (18 & 19 *Geo.* 5, *c.* 44), *s.* 3, *sub-s.* 1 (*b*), (*f*).

The appellants, manufacturers of air-craft accessories, occupied a canteen situated on a plot of land which at its nearest point was 260 feet distant from the main factory. The main factory was admittedly an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928. The canteen was restricted to the use of the appellants' employees and comprised two large dining-rooms, in which hot and cold meals were served, cloak-rooms and other accommodation. Meals were provided at a price which covered their cost without profit, and on the average 1,850 out of 2,000 employees were present at each meal. The canteen was regularly inspected by the inspectors of factories and complied with the requirements of the Factories (Canteens) Order, 1940. Electrical machinery was used in the kitchen of the canteen, including meat-slicers, potato-peelers, chippers and washing up machines, all such machinery being subject to the regulations for securing safety in factories contained in the Factories Act, 1937:—

Held, that the canteen was a factory or workshop within the meaning of s. 149, sub-s. 1, of the Factory and Workshop Act, 1901; that it was not primarily occupied and used either, "(*a*) for . . . . the purpose of a retail shop" or (*b*) "for any other

1943

SIMMONDS AEROCESSORIES (WESTERN), LD. v. PONTYPRIDD AREA ASSESSMENT COMMITTEE.

"purposes . . . . not those of a factory or workshop" within paras. (*b*) or (*f*) of the proviso to s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928; and that, therefore, it was an industrial hereditament within the meaning of the subsection and as such entitled to the de-rating provisions of the Act.

CASE stated by quarter sessions.

Before March 9, 1942, a canteen occupied and used by the appellants, Simmonds Aerocessories (Western), Ld., was inserted in part II of the valuation list as an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928 (1) and as such was entitled to the benefit of the de-rating provisions contained in the Act. On the said date, the area assessment committee, on an objection taken by the rating authority, directed that the entry of the hereditament in part II of the list be deleted and that the hereditament be inserted in part I of the list with a gross value of £169 and a rateable value of £137. The appellants appealed to quarter sessions and on the hearing of the appeal the following facts were proved or admitted.

The appellants, who were manufacturers of accessories for aircraft, occupied a factory, which was admittedly an industrial hereditament. By a lease, dated Aug. 14, 1940, they became the lessees and occupiers of an additional plot

(1) By s. 3, sub-s. 1, of the Rating and Valuation Apportionment Act, 1928: "In this Act the "expression 'industrial hereditament' means a hereditament ". . . . occupied and used . . . . "as a factory or workshop: "Provided that the expression "industrial hereditament does "not include a hereditament "occupied and used as a factory "or workshop if it is primarily "occupied and used for . . . . "(*b*) the purposes of a retail shop " . . . . (*f*) any other purposes, ". . . . which are not those of a "factory or workshop." By "sub-s. 2 " . . . . the expressions "'factory and workshop' have "respectively the same meanings "as in the Factory and Work"shops Acts, 1901 to 1920."

By s. 149, sub-s. 1, of the Factory and Workshop Act, 1901: "The expression 'non-textile "'factory' means . . . . (*c*) any "premises wherein or within the "close or curtilage or precincts "of which any manual labour is "exercised by way of trade or for "purposes of gain in or incidental "to any of the following pur"poses, namely— . . . . (iii.) the "adapting for sale of any article, "and wherein or within the close "or curtilage or precincts of "which steam, water or other "mechanical power is used in aid "of the manufacturing process "carried on there."

of land on the same estate, the nearest point of the plot being 260 feet from the factory. In accordance with a covenant contained in the lease the plot was used and occupied for the purposes of a canteen restricted exclusively to the use of employees engaged in work in the appellants' factory, each of whom received a pass enabling him to use the canteen. The canteen comprised a kitchen and two large dining-rooms, with tables and chairs, in which the employees had meals, cloak-rooms, and other accommodation. Hot and cold meals were served at prices which were estimated to cover the cost of the meals without profit. The employees numbered nearly 2,000, and the number using the canteen averaged 1,850 at each meal. Few, if any of the employees lived near enough to the factory to be able to go home to meals during working hours, and there were no other canteen or restaurant facilities within easy reach. Work was carried on in the factory for twenty-four hours a day. The canteen was regularly inspected by inspectors of factories and it satisfied the requirements of the Factories (Canteens) Order, 1940 (St. R. & O., 1940, No. 1993). Electrical machinery was used in the kitchen, including meat slicers, potato-peelers, chippers and washing-up machines, all of which were subject to the regulations for securing safety in factories contained in the Factories Act, 1937.

Quarter sessions were of opinion that the canteen was not an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 3, sub-s. 1, and dismissed the appeal. The appellants appealed.

Comyns Carr K.C. and *Dare* for the appellants. Quarter sessions were wrong in holding that this canteen was not an industrial hereditament. Two questions arise here, (1.) whether the hereditament used by itself is an industrial hereditament, and (2.) whether, by reason of the Rating and Valuation (Apportionment) Act, 1928, s. 3, sub-s. 3, the hereditament can be regarded as part of the appellants' main factory. The first question depends on whether the canteen was a factory or workshop within the meaning of s. 149, sub-s. 1 (*c*), of the Factory and Workshop Act, 1901. In that sub-section a non-textile factory is defined as including "any premises "wherein . . . any manual labour is exercised by way of "trade or for purposes of gain in or incidental to any of the "following purposes: . . . (iii.) the adapting for sale of "any article . . ." The cooking and preparation of food for consumption in a restaurant is "adapting it for sale" as much as packing chocolates, making flowers into wreaths, or sorting seeds or rags, all of which have been held to be "adapting "for sale." The fact that prices in the canteen are so arranged as only to cover cost, may prevent the work from being for the purpose of gain, but none the less, manual labour is exercised in the canteen by way of trade. It is clear, therefore, that the hereditament is, by itself, a factory or workshop, and, accordingly, unless it falls within the proviso to s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928 it is an industrial hereditament. The first ground on which it could be excluded under the proviso from that category would be that the canteen is primarily used and occupied as a retail shop, but use of a hereditament as a retail shop involves selling to the public. A club is not a retail shop, since only members and their guests are allowed to use the club premises. Here, not even guests are admitted to the canteen, which is exclusively reserved for the appellants' employees. Canteens have been held not to be retail shops for the purpose of apportionment. See *Cardiff Revenue Officer* v. *Cardiff Assessment Committee* (1) and *London Co-operative Society, Ld.* v. *Southern Essex Assessment Committee* (2). In the present case the hereditament is not used in any way as a retail shop, so the question whether it is "primarily" so used within the meaning of the sub-section does not arise. The second ground on which the hereditament, although a factory, could be excluded from being an industrial hereditament, would be that it was primarily occupied and used for purposes which were not those of a factory or workshop, but in this canteen the preparation, serving, and arranging of food for sale is the primary purpose for which it is used and occupied, and that purpose is a purpose of a factory or workshop. Finally, if it should be held that the canteen is not of itself an industrial hereditament, then by s. 3, sub-s. 3, of the Rating and Valuation (Apportionment) Act, 1928, it forms part of the appellants' main factory as being within the same curtilage as, or contiguous thereto (*Pilbrow* v. *Vestry of St. Leonard, Shoreditch* (3)). [They also referred to *Reg.* v. *Assessment Committee of St. George's Union* (4); *Gordon Hotels, Ld.* v. *London County*

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(1) [1931] 1 K. B. 47.

(2) [1942] 1 K. B. 53.

(3) [1895] 1 Q. B. 433.

(4) (1871) L. R. 7 Q. B. 90.

Council (1); *Moon* v. *London County Council* (2), and *Bailey* v. *Potteries Electric Traction Company* (3).

Montgomery K.C. and *Carey Evans* for the respondents. The decision of quarter sessions was right. The canteen was not in the same curtilage as, or contiguous to, the factory proper, and the appellants, therefore, cannot rely on s. 3, sub-s. 3, of the Rating and Valuation (Apportionment) Act, 1928. In *Pilbrow* v. *Vestry of St. Leonard, Shoreditch* (4) Rigby L.J., quoting from Stroud's Judicial Dictionary, accepted the definition of curtilage as being " a little garden, " yard, field or piece of void ground lying near or belonging " to the messuage." On that definition the canteen here could not be described as being within the curtilage of the factory. It must, therefore, be looked at as a self-contained hereditament. So considered, it is not a factory or workshop within the meaning of the Factory and Workshop Act, 1901 for the business carried on in the canteen is not carried on by way of trade or for the purpose of gain. Its primary object is the provision of a place in which to eat food, which is not a factory purpose. If, contrary to the respondents' contention, the canteen should be held to be a factory, it is conceded that it would fall within the definition of an industrial hereditament in s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, unless it is excluded by the proviso to the sub-section. It is so excluded either (1.) because it was primarily used and occupied as a retail shop within the definition in s. 3, sub-s. 4, of the Act, or (2.) because it was used for purposes which are not those of a factory or workshop.

Carr K.C. replied.

Cur. adv. vult.

Dec. 21. The judgment of the court (VISCOUNT CALDECOTE C.J., MACNAGHTEN and ATKINSON J.J.) was read by ATKINSON J., who stated the facts, and continued : Subject to certain exceptions specified in s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, an " industrial " hereditament " means a hereditament used and occupied as a factory or workshop, these expressions having the same meaning as in the Factory and Workshop Acts, 1901–1920.

(1) [1916] 2 K. B. 27.

(2) [1931] A. C. 151.

(3) [1931] 1 K. B. 385 ; [1931] A. C. 178.

(4) [1895] 1 Q. B. 433.

The first question, therefore, is whether this canteen is a factory or workshop. Both expressions include (inter alia) any premises wherein manual labour is exercised by way of trade, or for purposes of sale for gain, in or incidental to any of certain purposes, including the making of any article or the adapting for sale of any article.

It is plain that much manual labour is exercised in the canteen for the purpose of making articles of food and for the purpose of adapting articles of food for sale, and that such labour is exercised by way of trade. The canteen is, therefore, a factory or workshop. It is, however, said that, notwithstanding the fact that the canteen is a factory or workshop, it is not an industrial hereditament, because it falls within the proviso in s. 3, sub-s. 1, of the Act of 1928. That section, after providing that the expression " industrial " hereditament " means " a hereditament occupied and used as " a factory or workshop," contains this proviso : " Provided " that the expression ' industrial hereditament ' does not " include a hereditament occupied and used as a factory or " workshop if it is primarily occupied and used for the following " purposes, or for any combination of such purposes, that is " to say . . . (*b*) the purpose of a retail shop ; " " (*f*) any " other purposes, whether or not similar to any of the fore- " going, which are not those of a factory or workshop." It is said that the canteen is primarily occupied and used for the purpose of a retail shop or of premises of a similar character, where retail trade or business is carried on. Alternatively, it is said that, if not a retail shop, the canteen comes within para. (*f*) in that the primary purpose of the occupation and use is not that of a factory or workshop.

A " retail shop " is defined as including " premises of a " similar character where retail trade is carried on." There is no further definition of the expression " retail shop." It must, therefore, receive its ordinary and every-day meaning : per Lord Dunedin, in *Turpin* v. *Middlesbrough Assessment Committee* (1). Apart from authority, we think the main characteristic of a shop is that it is a place to which members of the public may resort for the purpose of buying and taking away the goods which are there offered for sale. We doubt whether anyone would regard a public-house with an on-licence or a restaurant as a shop. In *Gordon Hotels, Ld.* v. *London County Council* (2), the question for determination depended

(1) [1931] A. C. 473, 474.

(2) [1916] 2 K. B. 27.

on whether the grill-room and the dining-room at the First Avenue Hotel were shops within the definition of the word in the Shops Act, 1912. It was held that the grill-room was a shop, but the dining-room was not, inasmuch as the persons mainly using the grill-room were members of the public, but the main users of the dining-room were guests living in the hotel. But for the definition in the Shops Act, even the grill-room would have been held not to be a shop. Further guidance can be found in *Turpin* v. *Middlesbrough Assessment Committee* (1), where Lord Dunedin, dealing with the question whether a hereditament used for the repair of cars was a place with similar characteristics to those of a shop, said: " For " myself, I am unable to state what are the physical features " the existence of which is essential to or distinctive of a retail " shop. I am familiar with many physical features which are " frequently and even commonly found in retail shops, such " as counters and shop windows; but I am equally familiar " with retail shops where no such features exist. In my " opinion it is not possible to say that the words ' of a similar " ' character,' even if they include, are limited to physical " features of the premises. They must, as I read them, include " also similarity of character in other respects. The character " of the premises must be similar to the character of a retail " shop. Now if we compare the hereditament here in question " with a retail shop, do we find any common characteristics? " My Lords, I think we do; for they are both buildings to " which the public can resort for the purpose of having " particular wants supplied and services rendered therein." In *Toogood and Sons, Ld.* v. *Green* (2), Lord Thankerton quoted the passage I have read and went on: " In the recent " Scottish case of *Glasgow Assessor* v. *Henderson & Co.* (3), " Lord Sands says: ' It is quite true that in the case of " ' *Turpin* v. *Middlesbrough Assessment Committee* (4), Lord " ' Dunedin speaks of " buildings to which the public can " ' " resort for the purpose of having particular wants supplied " ' " and services rendered therein "—I think that when he " ' used the word " can," he must have meant " do," because " ' there are comparatively few manufacturers who would not, " ' on occasion, welcome members of the public to their " ' premises.' That ends the quotation from Lord Sands' " Judgment, but Lord Thankerton added: " I think this

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(1) [1931] A. C. 473, 474.

(2) [1932] A. C. 663, 674.

(3) [1932] Sc. L. T. 145, 146.

(4) [1931] A. C. 473.

1943

SIMMONDS AERO-CESSORIES (WESTERN), LD. v. PONTYPRIDD AREA ASSESSMENT COMMITTEE.

"paraphrase is inaccurate, and that the true element is in "the provision of accommodation in the premises for the "public who may so resort, even if in fact the business is "so unsuccessful that the public do not resort." Here no member of the public, as such has any right whatever to enter the premises. In fact, the public do not, and may not, resort there. No goods are on offer to the public or can be bought by the public. The feature of a shop is its appeal to the public, or some section of the public. The feature of these premises is privacy. If the canteen had been in the main premises, the point would be covered by authority. In *London Co-operative Society* v. *South Essex Assessment Committee* (1), the question was whether a similar canteen carried on in a laundry for the purpose of supplying food to the workers in the laundry was an industrial hereditament. It was contended that it was not to be deemed to form part of the factory, because it was solely used for some purpose other than the manufacturing process carried on there, namely, a retail shop. The rating appeal committee of quarter sessions had held that the canteen was occupied and used, not for industrial purposes, but as a retail shop. On a case stated for this court, that view was overruled. It was held that the canteen was not solely used for some purpose other than the manufacturing process or handicraft carried on in the laundry, and, per Tucker J., that it was necessary and essential for the welfare and efficiency of the workers and was a necessary and essential part of the factory. It was implicit in this decision that the canteen was not a retail shop. The fact that the canteen here was on a separate plot of land seems irrelevant in determining whether it is in fact, or has the characteristics of, a shop.

There remains the question whether the canteen is within s. 3, sub-s. 1 (*f*). Is the canteen primarily occupied and used for purposes which are not those of a factory or workshop? It is necessary to see with some particularity what are the matters which bring the canteen within the definition of a factory or workshop. In addition to the fact that much manual labour is exercised for the purpose of making articles of food and for the purpose of adapting food for sale, it is plain that much manual labour must be exercised on matters which are incidental to these purposes. The definition includes manual labour exercised in or incidental to the specified purposes. These words must cover the washing-up and cleaning of all the cooking utensils so that they are available when wanted for the preparation of the next meal to be provided. So, too, doubtless, some labour is expended in arranging the food for sale so that it may look the more attractive. In *Fullers, Ld.* v. *Squire* (1), such preparation was held to be covered by the words "adapting for sale." Large quantities of food in a raw state must be delivered to the canteen, and the real purpose and use of the place is to put it or turn it into an edible, and, therefore, saleable, form or condition for the benefit of the appellants' employees. It seems to us that the canteen is primarily occupied and used for that purpose, and that that purpose is a purpose of a factory or workshop within the definition and further that it is so used in order to comply with the Factories (Canteens) Order, 1940.

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(1) [1942] 1 K. B. 53.

We have not dealt with the question whether the canteen is within the same curtilage as the main factory. If it is, it is to be treated as if part of the main factory. We have great difficulty in seeing how it can be said to be within the same curtilage, but it is unnecessary to decide that point, as we are satisfied that, apart from it, the canteen is an industrial hereditament. The appeal, therefore, succeeds and the determination of the committee is reversed.

Appeal allowed.

Solicitors for appellants: *Simmonds & James, Church, Rackham & Co.*

Solicitors for respondents: *Spickett & Sons.*

P. B. D.

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(1) [1901] 2 K. B. 209.

ATTORNEY-GENERAL *v.* DAIMLER COMPANY, LIMITED.

C. A.

1944
Jan. 18.

Appeal—Court of Appeal—Latin information—"Action"—Time for bringing appeal—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 6, *c.* 49), *s.* 225—*R. S. C., Or.* 58, *r.* 15.

A proceeding by Latin information, initiated by a writ of subpœna, is an "action" within the definition in s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, as "a civil proceeding commenced by writ," and, accordingly, the time for an appeal against a decision on such an information is six weeks as prescribed by R. S. C., Or. 58, r. 15, to which the definition in s. 225 of the Act of 1925 is applied by Or. 68, r. 2.

C. A.

1944

ATTORNEY-GENERAL v. DAIMLER CO., LD.

APPLICATION by the informant, the Attorney-General, to extend time for leave to appeal.

On October 27, 1943, a Latin information by the Attorney-General against the defendants was heard before Stable J., on the revenue side, and judgment was entered for the defendants. Notice of appeal was given by the Attorney-General more than eighteen days, but within six weeks after the judgment, but the King's Remembrancer's department refused to enter the appeal on the ground that it was out of time. It was admitted that, if a proceeding by Latin information was an "action," within s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, and R. S. C. Or. 58, r. 15 (1), the appeal was in time, and that otherwise it was out of time. The proceeding is commenced by a writ of subpœna. In form the writ runs "George the Sixth by "the grace of God, etc., to . . . . greeting. We command "and strictly enjoin you that within . . . days from the "service of this writ . . . . you cause an appearance to be "entered for you . . . . to answer us . . . . and take notice, "that in default of your so doing we shall proceed thereon to "judgment and execution." It is endorsed "Take notice "that in default of your entering an appearance according to "the exigency of this writ, an information may be filed and "judgment signed thereon . . . ." The Attorney-General applied for leave to appeal against the decision of the King's Remembrancer's department.

Valentine Holmes for the Attorney-General. The department were wrong in their view that this is not an action. The form of the writ of subpœna is set out in Stuart Robertson's "Civil Proceedings by and against the Crown," on p. 260. It is called a writ both on the front and the back and has all

(1) By Supreme Court of Judicature (Consolidation) Act, 1925, s. 225: "'Action' means a civil "proceeding commenced by writ "or in such other manner as "may be prescribed by rules of "court . . ." By Or. 71, r. 1, of the Rules of the Supreme Court this section was made applicable to the Rules.

Or. 58, r. 15 (applied to proceedings on the revenue side by Or. 68, r. 2) as amended by R. S. C. (No. 8) 1940: "No appeal "to the Court of Appeal from any "interlocutory order, or from any "order, whether final or interlocutory, in any matter not "being an action, shall be brought "after the expiration of eighteen "days, and no other appeal shall "be brought after the expiration "of six weeks."

Or. 2, r. 1: "Every action in "the High Court shall be commenced by a writ of summons."

C. A.

1944

Attorney-General v. Daimler Co., Ld.

the essential features of a writ, and by s. 225 of the Judicature Act, 1925, a civil proceeding commenced by writ is an action. Therefore, this proceeding is an action, and the appeal should have been entered as it was tendered within six weeks, and was in time.

J. A. Reid for the defendants. This is not an action within s. 225. It was not commenced " in such other manner as may " be prescribed by rules of court," for the Rules of the Supreme Court do not deal with this writ of subpœna and no form for it is set out in the appendix to the rules.

Scott L.J. This is an application arising out of proceedings by Latin information. It involves the question whether the King's Remembrancer's department were wrong in refusing a notice of appeal by the Crown which was made within six weeks of the judgment appealed against. The department thought that the short time for an appeal applicable to any matter " not being an action," under Or. 58, r. 15, applied and, therefore, they rejected the notice which was more than eighteen days after the judgment.

The solution of the problem depends on the Judicature Act, 1925, which repeats the definitions in earlier Judicature Acts. By s. 225 of the Act of 1925 " ' action ' means a civil " proceeding commenced by writ or in such other manner as " may be prescribed by rules of court, but does not include " a criminal proceeding by the Crown." A proceeding by Latin information is commenced by writ of subpœna which is addressed to a person who is named as the defendant. It is expressed in these words, " We command and strictly enjoin " you, that . . . . you cause an appearance, etc. . . . Take " notice, that in default of your entering an appearance, etc." in the usual form of a writ of summons. By R. S. C. Or. 58, r. 15, appeals in an " action " must be brought within six weeks. Otherwise the time is eighteen days.

The question, therefore, is whether this proceeding is an " action." In my view, it is a civil proceeding commenced by writ ; if so it is an " action " within the section. That being so, and the appeal being against a final order, the Attorney-General was in time when he sought to enter it. In form the present application is to extend the time for appeal, but that is a necessary formality, because, owing to the action of the department, the six weeks have expired. The appeal is allowed, and time for appeal extended for seven days from today.

LUXMOORE L.J. The sole question is whether the proceeding which is known as a Latin information can properly be described as an action for the purposes of Or. 58, r. 15. It is a proceeding on the revenue side of the King's Bench Division, and, therefore, by Or. 68, r. 1, the Rules of the Supreme Court do not apply except so far as expressly provided. By r. 2 (*e*) of the order it is provided that, among other orders, Or. 58 shall apply to all proceedings on the revenue side of the King's Bench Division, but neither Or. 1 or Or. 2 [which relate to commencement of action and other proceedings] are made applicable.

[His Lordship read Or. 58, r. 15.] By Or. 71, r. 1, s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, is made applicable to the Rules of the Supreme Court, and, therefore, " action " in Or. 58, r. 15, has the meaning given to it by the definition contained in s. 225, namely, " a civil " proceeding commenced by writ or in such other manner " as may be prescribed by rules of court, but does not include " a criminal proceeding by the Crown." A Latin information is started by what is called on the face of the document a writ of subpœna which is followed by an information. The subpœna requires the person named to enter an appearance. It is called a writ. It has all the features of the ordinary writ of summons. I cannot think of any other term by which it could better be described than as a writ, as, indeed, Mr. Reid admitted. Mr. Reid's argument proceeded on the footing that the words of s. 225 were only " in such . . . . manner " as may be prescribed by rules of court," and as if the words " commenced by writ " had been omitted. There is no reason for ignoring the words " commenced by writ." In my judgment, the department was wrong in refusing to accept the notice of appeal, and I agree that this appeal must be allowed.

GODDARD L.J. I agree.

Appeal allowed.

Solicitor for applicant: *Treasury Solicitor.*

Solicitors for defendants : *Andrew, Purves, Sutton & Creery, for R. A. Rotheram & Co., Coventry.*

W. L. L. B.

REX *v.* LINCOLN COUNTY JUSTICES;

Ex parte TRAFFORD.

1944
Jan. 13, 14,
24.

Quarter sessions—Appeal committee—Costs—Abandoned appeal—Order as to costs made by newly appointed appeal committee—Jurisdiction of committee to make order—Quarter Sessions Act, 1849 (12 *&* 13 *Vict., c.* 45), *ss.* 6, 7*—Summary Jurisdiction* (*Appeals*) *Act,* 1933 (23 & 24 *Geo.* 5, *c.* 38), *s.* 7, *sub-s.* 4.

A person who had been convicted on three summonses at petty sessions appealed against his convictions to quarter sessions. The appeals came on for hearing before the appeal committee of quarter sessions on March 27, 1942, when the appeals were adjourned to a date which was subsequently fixed as June 16, 1942. Before that date arrived the appellant gave notice of the abandonment of the appeals, with the result that the appeal committee did not sit on June 16. On October 2, 1942, the respondent applied to the appeal committee that the appeals should be reinstated in the list so that he might apply for costs. On the same day a fresh appeal committee was appointed by quarter sessions for the ensuing twelve months. On October 26 the newly appointed appeal committee heard and granted the respondent's application for the costs of the abandoned appeals. On a motion for certiorari:—

Held, that the application for the costs of the abandoned appeals ought to have been made to the sessions to which the notice of abandonment had been given, and that, as the matter of the costs of the abandoned appeals had not been adjourned, the newly appointed appeal committee had no jurisdiction to make the order as to the costs of the abandoned appeals which they had made.

MOTION for an order of certiorari.

The applicant, Frank Trafford, sought by this motion an order of certiorari to remove into the High Court to be quashed an order for costs which the appeal committee of the quarter sessions for the county of Lincoln (Parts of Lindsey) on October 26, 1942, made against him in favour of Joseph Hutchinson, the respondent, the divisional enforcement inspector of the Ministry of Food.

On December 24, 1941, the applicant was convicted at Scunthorpe petty sessions on three summonses under the Waste of Food Order, 1940. He appealed to quarter sessions. The appeal came on for hearing on March 27, 1942, when his counsel took a point not raised in the grounds of appeal, that the convictions were bad because the clerk to the justices in petty sessions was also food executive officer for the district.

There were doubts whether the appeal committee could decide such a point or whether it was a matter for the consideration of the High Court. At the request of counsel for the respondent an adjournment was granted so that he could bring before the appeal committee evidence to deal with the point, and the hearing of the appeal was adjourned to a special day to be fixed. On May 29 that special day was fixed for June 16, 1942. Before that day had arrived the applicant had decided that an application to the King's Bench Division for certiorari was the better procedure, and, on May 30, 1942, he served notice of abandonment of the appeal. The appeal committee did not sit on June 16. On June 15 the applicant applied to the King's Bench Division and obtained leave to issue notice of motion for certiorari in respect of the three convictions and this was granted. This motion came before the High Court on January 13, 1944, and the convictions were quashed. The respondent took no steps with regard to the costs of the abandoned appeals before the appeal committee of quarter sessions until October 2, 1942, when his counsel applied ex parte that the appeals should be put back into the list that he might apply for costs consequent on the abandonment of the appeals. This application was acceded to and a sitting of the committee fixed for October 26, 1942. The appeal committee of the county of Lincoln (Parts of Lindsey) were appointed annually at the Michaelmas quarter sessions. On October 2, 1942, certain justices were appointed to be members of the appeal committee. All the members of the appeal committee present at the original hearing on March 27, 1942, were re-appointed members of the appeal committee and six of them sat on October 26, 1942, and made an order against the applicant for the costs of the abandoned appeals. The applicant now applied for an order of certiorari to quash this order.

Sandlands K.C. and *Elborne* for the applicant. The appeal committee of quarter sessions had no jurisdiction to make the order as to the costs of the abandoned appeal. Under s. 5 of Baines Act (Quarter Sessions Act, 1849), on any appeal to quarter sessions the court before whom the same shall be brought may, if it think fit, order the party against whom the same shall be decided to pay costs to the other party. Under s. 6 of the same Act, any court of quarter sessions, on proof of notice of appeal to the same court having been given to the party entitled to receive the same, though such appeal was not afterwards prosecuted or entered, may, if it think fit *at the same sessions for which such notice was given*, order that costs should be paid by the person giving such notice to the person receiving the same. It was held in *Reg.* v. *Staffordshire Justices* (1) that the sessions at which an appeal was heard and determined alone had jurisdiction to grant costs, and that the order of a subsequent sessions purporting to grant costs was made without jurisdiction and was invalid. In *Midland Railway Co.* v. *Guardians of Edmonton Union* (2) there was an order of a subsequent quarter sessions for the taxation and payment by the defendants of the taxed costs of the plaintiffs. A. L. Smith L.J. said: "Unless there "was an agreement in court to tax the costs out of court, "they must be taxed in court, and no subsequent court "of quarter sessions had jurisdiction in the matter." The only court which could deal with the costs in the present case was the appeal committee to which notice of abandonment had been given. The respondent could have gone to that court when notice of abandonment of the appeal had been given and asked for his costs, but he did not do so. There cannot be a resuscitation at a subsequent sessions of an abandoned appeal to allow the respondent to the appeal to make an application for costs. Under neither the old law nor the Administration of Justice Act, 1938, s. 3, was there any jurisdiction in the justices who sat on October 26 to make an order against the applicant for costs of appeals abandoned in June. An appeal committee under s. 7, sub-s. 4, of the Summary Jurisdiction (Appeals) Act, 1933, have the same powers with respect to the hearing and determination of appeals and with respect to costs as they would have if they were a court of quarter sessions. It is provided in sub-s. 2 that the appeal committee shall be deemed to be a standing committee of quarter sessions for the period for which they are appointed, or, if no period is fixed, until their successors are appointed. The jurisdiction of the appeal committee cannot, therefore, go on beyond the period for which they were appointed.

C. E. Rochford for the respondent. The power of a court of quarter sessions under s. 4 of the Act of 1933 to order the appellant to pay to the respondent his costs of the abandoned appeal only arises if notice of abandonment of the appeal is given by the appellant not less than two clear days before the date fixed for the hearing. The construction sought to be placed on the statutes under which the appeal committee of quarter sessions act is not one which this court will readily accept. Under s. 5 of the Act of 1933 quarter sessions have complete power to fix a sum to be paid by way of costs by either party to an appeal. That power is delegated to the appeal committee. Section 1 of the Act of 1933 substituted a new section with regard to procedure on appeals to quarter sessions for s. 31 of the Summary Jurisdiction Act, 1879. Sub-section 7 of that new s. 31 provides that quarter sessions may also make such order as to costs to be paid by either party as they think just. Section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, extended the powers of quarter sessions and of appeal committees to adjourn sessions generally. The effect of sub-s. 1 of that section is to make an appeal committee of quarter sessions a continuing body so that a newly appointed appeal committee can deal with a proceeding which might have been dealt with at an adjourned sessions. This matter was adjourned on March 27 and was still adjourned on October 2, when the appeal committee went out of office, and as the question of costs might have been dealt with by the original appeal committee, the newly appointed appeal committee could properly make the order as to costs of the abandoned appeals which they made. The effect of s. 3 of the Act of 1938 is to give jurisdiction to a newly appointed appeal committee to deal with all matters which might have been dealt with by the appeal committee which has ceased to exist.

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(1) (1857) 7 E. & B. 935.

(2) [1895] 1 Q. B. 357, 366.

Sandlands K.C. in reply. Section 3 of the Act of 1938 has no application to appeal committees of quarter sessions. It only deals with the powers of quarter sessions with reference to their original criminal jurisdiction. The original appeal committee having ceased to exist without having made an order as to these costs or without having adjourned the consideration of such matter, the newly appointed appeal committee, even though composed of the same members or of a majority of the members of the original appeal committee, had no jurisdiction to make this order as to the costs of the abandoned appeals.

Cur. adv. vult.

Jan. 24. The judgment of the court (HUMPHREYS, ATKINSON and CASSELS JJ.) was read by CASSELS J. This case raises an issue as to the jurisdiction of an appeal committee of quarter sessions. Can a newly elected and appointed appeal committee deal with the costs of an appeal which has been before an appeal committee which previously exercised jurisdiction? For the respondent it was contended that an appeal committee is a continuing body, for the applicant it was contended that, the original appeal committee having ceased to exist, no fresh committee, though composed of a majority or even entirely of the same members, can exercise jurisdiction as to the costs in this case. [His Lordship stated the facts.]

Had that appeal committee, newly-elected and newly-appointed only a few days before, jurisdiction to deal with the costs of an appeal which had been before their predecessors seven months before? If they had, this order must stand. If they had not, then this order must be removed into the King's Bench Division for the purpose of being quashed.

By the Summary Jurisdiction (Appeals) Act, 1933, s. 7, the powers and duties of a court of quarter sessions with respect to appeals are performed by a committee of the justices of the county appointed by quarter sessions and known as the appeal committee. They are a standing committee for the period for which they are appointed, or if no period is fixed, until their successors are appointed, and their jurisdiction is not affected by the termination of the sessions at which they are appointed. The committee act by a court consisting of not less than three or more than twelve members of the committee, and that court has the same powers with respect to the hearing and determination of appeals and with respect to costs arising out of appeals as they would have if they were a court of quarter sessions. In other words, the appeal committee possess the same powers, no greater and no less, as quarter sessions. By the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 3, the powers of a court of quarter sessions include power to adjourn the sessions generally, and, if the adjourned sessions are not concluded before the next sessions, they shall be deemed to be concluded immediately before the commencement of the sessions to be held on the fixed day and any proceedings which might have been dealt with by the adjourned sessions can be dealt with as if they had been adjourned to the fixed sessions. It was urged on behalf of the respondent that that last statutory provision justified

1944

REX
v.
LINCOLN
COUNTY
JUSTICES.
Ex parte
TRAFFORD.

the order made by the appeal committee on October 26, 1942, in this case.

In our opinion, that argument cannot prevail. This was a newly elected and newly appointed appeal committee. It sat to deal with this matter on October 26, 1942. It began its life on October 3, 1942. The committee which had seizin of these three appeals had ceased to exist on October 2, 1942. Whether after June 16, 1942, and before October 2, 1942, the earlier committee had jurisdiction with regard to the costs of the abandoned appeals does not arise, for the simple reason that they did not deal with those costs and we are not called on to decide that question, but it is to be observed that the only adjournment that took place was from March 27 to June 16, 1942. Can it be said that at any time without limit the respondent could apply to the appeal committee? We think it cannot. The fact is that the respondent did not apply to the appeal committee between May 30 and October 26, 1942, and his is the default which led to the position in which he finds himself.

Baines Act, 1849, s. 5 states as follows: " And be it enacted, " that upon any appeal to any court of general or quarter " sessions of the peace the court before whom the same shall " be brought may, if it think fit, order and direct the party " or parties against whom the same shall be decided to pay " to the other party or parties such costs and charges as may " to such court appear just and reasonable, such costs to be " recoverable in the manner provided for the recovery of costs " upon an appeal against an order or conviction by an " Act passed in the twelfth year of Her Majesty's reign, " intituled an Act to facilitate the performance of the duties " of justices of the peace out of sessions within England and " Wales with respect to summary convictions and orders." By s. 6 of the same Act it is enacted as follows: "And for the more " effectual prevention of frivolous appeals, be it enacted, " that any court of general or quarter sessions of the peace, " upon proof of notice of any appeal to the same court having " been given to the party or parties entitled to receive the " same, though such appeal was not afterwards prosecuted or " entered, may, if it so think fit, at the same sessions for which " such notice was given, order to the party or parties receiving " the same such costs and charges as by the said court shall " be thought reasonable and just to be paid by the party or " parties giving such notice, such costs to be recoverable in "the manner last aforesaid." It is to be noticed there that it is at the same sessions.

Our attention was drawn to *Reg.* v. *Staffordshire Justices* (1), where one quarter sessions made an order as to the costs of an appeal abandoned before a previous sessions which had been silent as to costs, and that order was quashed by the Court of Queen's Bench. In the course of the judgments in that case Lord Campbell C.J. said: "There is in this case a seeming "hardship that the respondents should not have costs; but "they lose them by their own default. They should at the "June sessions have asked for the costs; and, if that sessions "in their discretion thought it a fit case for costs, they would "have then been awarded in the order confirming the order of "justices, subject to the case. But they did not ask for "costs; and the order was silent as to them. Had the case "been proceeded with, and that order brought up with the "case, we could not have confirmed that order with costs "of the appeal, but only as it was, that is, silent as to costs. "So the respondents have not lost these costs in consequence "of the abandonment of the case by the appellants. Then "it seems to me that when that order was made the sessions "were functi officio. The order was subject to a case; but "the sessions then, as far as they were concerned, confirmed "or quashed the order of justices according to what the "opinion of this court might turn out to be." Then he says: "If the sessions who hear on the merits and grant "the case think it a fit case for costs they should give them, "but, if it were necessary, for the purpose of getting costs, "to go before a subsequent sessions and ask for them from "justices who do not know what happened before, it would "be productive of much expense and probably of much "injustice. Such a course is not required." Erle J. giving judgment in the same case said this: "I also am of opinion "that the subsequent sessions had no jurisdiction over this "order. No doubt the quarter sessions is for many purposes "a permanent tribunal: but still there are many things that "can be done only by a particular sessions, as the specific "tribunal for that thing. Here the sessions who heard the "appeal confirmed the order and were silent as to costs. "That was in legal effect the same as if they had confirmed "it expressly without costs. The confirmation was subject "to a case; but, so far as this court did not interfere, it was

(1) 7 E. & B. 935.

" absolute. That being so, it seems to me that the application " to the Epiphany sessions clearly was an application to them " to alter the judgment of the former sessions, by rectifying " the error which they had committed in omitting to give " costs in a fit case. But the Epiphany sessions had no " jurisdiction to do this."

It is clear from those judgments that under the old practice quarter sessions would have had no power to deal with these costs. Powers to adjourn sessions have now been given to quarter sessions, and, therefore, to appeal committees, but this matter never was adjourned. Quarter sessions could not have dealt with it. It follows that the appeal committee could not do what quarter sessions had no power to do. Our conclusion is that the appeal committee which made this order as to costs had no jurisdiction to make it, and that order must be quashed. The motion succeeds with costs and the order for certiorari must go.

Order for certiorari.

Solicitors for applicant : *Sharpe, Pritchard & Co., for William Bains, Scunthorpe.*

Solicitor for respondent : *Treasury Solicitor.*

R. F. S.

1944
Jan. 12, 13.

HALSTED *v.* CLARK.

Criminal law—Plea—Autrefois acquit—Summons for recklessly making false statement—Earlier summons for making the same statement, when word "recklessly" omitted—Application for amendment refused on ground that prosecution had failed to prove recklessness.

The respondent was summoned on an information for contravening reg. 82 (2.) of the Defence (General) Regulations, 1939, " in that, in furnishing information for the purposes of an order " made under the regulations, he had made a statement which " was false in a material particular." These words disclosing no offence, at the hearing the prosecution applied to amend the information and summons by the insertion of the word " recklessly " before the word " made," but the justices refused to make the amendment on the ground that the prosecution had failed to discharge the burden of proving " recklessness " on the part of the respondent, and they dismissed the summons. The respondent was subsequently summoned on an information in respect of the same statement and in substance in the same words except that the word "recklessly" was inserted before the word "made." He pleaded autrefois acquit:—

Held, that the plea was good, the respondent having been in peril at the hearing of the earlier information, since the justices might have then taken the view that the prosecution had satisfied the onus of proof which was on them.

CASE stated by Luton justices.

At a court of summary jurisdiction sitting at Luton on March 24, 1943, an information was preferred by the appellant, on behalf of the Minister of Supply against the respondent, a director of Geo. Bramhall, Ld., for that he on or about July 9, 1942, in the borough of Luton, did contravene the provisions of reg. 82 (2.) of the Defence (General) Regulations, 1939, in that he, in furnishing information for the purposes of the Control of Rubber Tyres (No. 4) Order, 1942, made under the regulations, recklessly made a statement which was false in a material particular. The information then set out particulars of the statement and of the material particular in which it was alleged to be false.

At the hearing of the information it was proved or admitted that the appellant had previously preferred an information against the respondent which was heard on February 24, 1943, before the Luton justices. The information before the justices on February 24 was in respect of the same statement and in substance in the same words as that which was before them on March 24, except that the word "recklessly" had been omitted from the information and summons. At the close of the case for the prosecution on February 24, 1943, counsel for the respondent contended (i.) that there was no case to answer since there was no offence known to the law disclosed on the summons; and (ii.) that, if and when an application was made by the prosecution for leave to amend the summons by the insertion of the word "recklessly," such an application should be refused on the ground that no evidence of recklessness had been adduced by the prosecution, or, alternatively, that any evidence so adduced was wholly insufficient to sustain a charge of recklessness in the making of the statement complained of, and accordingly, that in either case no useful purpose would be served by allowing the amendment. Counsel for the appellant asked for leave to amend the summons by the insertion of the word "recklessly," whereupon counsel for the respondent renewed the second of his submissions.

The justices refused leave to amend the summons, and, accordingly, that summons was dismissed. At the hearing of the information on March 24, 1943, the respondent entered a plea of autrefois acquit which the justices held to be good. They, therefore, dismissed the information.

Valentine Holmes for the appellant. The test whether a plea of autrefois acquit is established is whether on the first trial the accused was placed in peril of conviction: per Avory J. in *Rex* v. *Marsham* (1) and Halsbury's Laws of England, 2nd ed., tit Criminal Law, vol. 9, s. 212, p. 153. The respondent was never "in peril" at the hearing of the information on February 24, 1943, since the justices (1.) had no jurisdiction to amend the summons and (2.) they did not in fact do so. As to the first point, the information and the summons which purported to be for a contravention of reg. 82 (2.) of the Defence (General) Regulations, 1939, did not allege either that the respondent made a statement which he knew to be false in a material particular, or that he recklessly made a statement which was false in a material particular. It disclosed no statement of any offence known to the law, and, therefore, the justices had no power to amend the information or the summons, at all events without the consent of the accused: s. 32, sub-s. 1, of the Criminal Justice Act, 1925; Atkinson's "The Magistrate's Practice," 12th ed., p. 80. If s. 1 of the Summary Jurisdiction Act, 1848, does allow of the amendment of an information and summons, it does not permit of an amendment which will alter an information or summons disclosing no offence (which is nullity) into an information and summons charging an offence. In *Jenkins* v. *Merthyr Tydvil U.D.C.* (2) the magistrate dismissed a first summons on the ground that it was defective in that no offence to which a penalty was attached by the statute was set out. On a second summons in proper form the magistrate convicted, and the conviction was upheld on the ground that the matter had not been decided, one way or the other, on the first summons. Secondly, the justices did not amend this information and summons which disclosed no offence. Had they convicted the respondent on that occasion, the conviction would have been bad. An accused person cannot be "in peril" on a summons which charges no offence known to the law.

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(1) [1912] 2 K. B. 362, 365.

(2) (1899) 80 L. T. 600.

1944

HALSTED
v.
CLARK.

Slade K.C. and *A. L. Gordon* for the respondent. The justices were right in giving effect to the plea of autrefois acquit at the hearing of the later information, because the respondent was "in peril" at the hearing of the first information from the moment when an application was made to the court to amend the summons. If the application to amend the summons had been granted, the respondent might have been convicted, since the summons would then have disclosed an offence. The justices refused to amend the summons on the ground that the evidence for the prosecution did not sustain a charge of "recklessness," but they might have amended the summons had they considered that the prosecution had made out a case. Jurisdiction to amend an information or summons is to be implied from s. 1 of the Summary Jurisdiction Act, 1848; *Rodgers* v. *Richards and Others* (1). Where an adjudication on a first summons is only voidable, the accused person has been placed "in peril," but where the adjudication is void there has been no peril: see the judgment of Lord O'Brien C.J. in *Rex* v. *Galway Justices* (2), cited in *Rex* v. *Simpson* (3). [*Haynes* v. *Davis* (4); *Grimble and Co.* v. *Preston* (5); and *Rex* v. *Barron* (6) were also cited.]

Valentine Holmes replied.

LAWRENCE J. We have heard argument on the question how far there would have been a right to amend the first information and summons. That is a question of general importance, but I do not think it necessary for me to express any opinion on it. On the hearing of the first summons there was no issue between the parties as to the right of the justices to make the amendment, and it was not contended before us that the justices had not the power to give leave for the issue of a new summons.

In my opinion, on the facts stated, the justices refused leave to amend the information and summons on the ground which had been put before them by the respondent, namely, that it was useless to make the amendment having regard to the evidence which had been given for the prosecution which did not satisfy the court that any offence had been committed.

(1) [1892] 1 Q. B. 555.
(2) [1906] 2 I. R. 499, 502.
(3) [1914] 1 K. B. 66, 72.
(4) [1915] 1 K. B. 332.
(5) [1914] 1 K. B. 270.
(6) [1914] 2 K. B. 570.

If that is the true view of the justices' decision at the hearing of the first information, it follows that the respondent had been "in peril," because the justices might have taken the opposite view and have held that there was evidence that he had recklessly made a statement which was false in a material particular. I base my view of the action of the justices, in refusing to make the amendment, on the statement in the case that they were of opinion that the contention of the respondent was right, that contention being "that the respondent had "been 'in peril' of conviction on the earlier information "since the amendment might have been allowed and (counsel "assumed) had in fact been refused on the ground that the "prosecution had failed to discharge the burden of proving "'recklessness' on the part of the respondent in the making "of the statement complained of." I am, therefore, of opinion that the plea of autrefois acquit was a good plea, and that this appeal ought to be dismissed.

LEWIS J. I agree, and I also confine my remarks to the special case and the facts disclosed in it. I am satisfied that the justices had refused the amendment of the earlier information on the ground that it would have served no useful purpose to have allowed it in view of the fact that no evidence had been adduced before the justices to prove the charge that the respondent had recklessly made a statement which was false in a material particular.

WROTTESLEY J. I agree with the decision of my brethren for the reason which they have given. That reason is fortified by the facts stated in the case as to the objection by the respondent to the amendment of the first information and summons. That objection was made, not on the ground that the justices had no power to make the amendment, but only on the ground that it would be a waste of time to make it, because there was no evidence before the court to sustain the case for the prosecution and so to justify the amendment. On the narrow ground stated by the justices I think that the plea of autrefois acquit was a good plea.

Appeal dismissed.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondent: *Gibson & Weldon, for Neve, Son & Co., Luton.*

C. G. M.

STANLEY *v.* INLAND REVENUE COMMISSIONERS.

C. A.
1943
Dec. 14, 15, 16.
1944
Jan. 24.

Revenue—Income tax—Trust—Vested interest—Accumulation of income during minority—Liability to sur-tax—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 31.

The appellant had a vested interest as tenant for life of certain estates, the income whereof (subject to payments for maintenance) accumulated in the hands of trustees during the four years of his infancy. On his attaining his majority, the trustees paid the accumulated income to him. The Crown claimed sur-tax thereon in respect of each year of the minority.

Section 31, sub-s. 2, of the Trustee Act, 1925, enacts that, in the event of the death, before attaining twenty-one years or marrying under that age, of an infant entitled to a vested interest, the trustees shall hold the accumulations as an accretion to capital, instead of, as heretofore, in trust for the infant's personal representatives:—

Held, that the effect of the sub-section was to cause the surplus income of the settled property arising during the appellant's infancy to cease to be his income and to convert his interest in the surplus income into a contingent interest, and, therefore, that no sur-tax was payable in respect of the accumulations.

Decision of Macnaghten J. [1943] K. B. 717 reversed.

APPEAL from Macnaghten J. (1).

At a meeting of the Special Commissioners of Income Tax on October 8, 1941, the appellant, Hon. Lyulph H. V. O. Stanley, appealed against four additional assessments to sur-tax for the years ending April 5, 1934, 1935, 1936 and 1937 in the sums of 3,500*l*., 4,000*l*., 4,000*l*., and 2,750*l*. respectively. Under a deed of resettlement, dated April 21, 1904, the fourth Baron Stanley of Alderley became the tenant for life of real estates in Wales. He died on March 18, 1925, and his eldest son, the fifth baron, became life tenant of the estate, with a general power of appointment. By his will, dated June 2, 1926, the fifth baron, who died on August 22, 1931, appointed the appellant tenant for life of the estates. At the time of his father's death the appellant was an infant, and during his infancy the trustees under the will accumulated such portion of the income of the estates as was not expended on maintenance under the statutory provisions as to maintenance and accumulation during infancy. It was admitted that the appellant took a vested life interest in the estates, and that, on attaining his majority on October 23, 1938, he became entitled to the accumulations absolutely pursuant to s. 31,

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(1) [1943] K. B. 717.

C. A.

1943

STANLEY
v.
INLAND
REVENUE
COM-
MISSIONERS.

sub-s. 2, of the Trustee Act, 1925 (1) The four additional assessments to sur-tax were made on the footing that during the minority of the appellant the income of the settled estates belonged to him, and were, therefore, assessable to tax. The commissioners held, with considerable doubt, that the trustees were in the position of bankers for the appellant, so that the income was his income year by year as it accrued, and they dismissed the appeal. Macnaghten J. dismissed an appeal to him. The appellant appealed.

Roxburgh K.C. and *Scrimgeour* for the appellant. The assessments on the appellant were made on the footing that the income arising from the settled estates belonged to him during his infancy because he had a vested interest. The Trustee Act, 1925, s. 31, sub-s. 2, however, altered the whole position by assimilating a vested to a contingent interest. The income arising during the appellant's infancy and then accumulated was not his income, for, if he had died before attaining his majority, the accumulations of income would have accrued to capital. That is exactly as in the case of a contingent interest, and it has never been suggested that an infant with a contingent interest only had to pay sur-tax on the accumulations when he received them on coming of age. He receives the accumulations as capital. The only tax payable was in respect of sums applied for the maintenance of the infant. Under the law as it existed before the coming into force of the Trustee Act, 1925, an infant whose interest was vested had an absolute right to the accumulations, and if he died before attaining the age of twenty-one years they formed part of his estate, but now an infant tenant for life whose interest in the settled property is vested, is only contingently entitled to the accumulated income, which therefore does not form part of his total income for sur-tax purposes. [They referred to *Inland Revenue Commissioners* v. *Blackwell* (1).]

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(1) The Trustee Act, 1925, s. 31, sub-s. 2, provides: "During the "infancy of any such person" [a person for whom an interest, whether vested or contingent, is held in trust], "if his interest so "long continues, the trustees "shall accumulate the residue of "that income" [after providing for maintenance] "in the way of "compound interest by investing "the same and the resulting in"come therefrom from time to "time in authorized investments, "and shall hold these accumula"tions as follows—(i.) If any such "person—(*a*) attains the age of "twenty-one years, or marries "under that age, and his interest "in such income during his in"fancy or until his marriage is a "vested interest . . . . the "trustees shall hold the accumula"tions in trust for such person "absolutely . . . .; and (ii.) In "any other case the trustees shall, "notwithstanding that such per"son had a vested interest in "such income, hold the accumu"lations as an accretion to the "capital of the property from "which such accumulations "arose . . . ."

Sir D. Maxwell Fyfe S.-G., J. H. Stamp, and *R. P. Hills* for the Crown. The distinction between a vested and a contingent interest was made clear by Sargant L.J. in *Dale* v. *Mitcalfe* (2). A vested interest has always been treated as the absolute property of the infant so that the income was subject to tax whether it was accumulated or not. The Income Tax Act, 1918, s. 25, extended to contingent interests the relief by way of allowances always given to vested interests with the difference that the allowances in respect of income of a vested interest were given year by year, but those in respect of income of a contingent interest only when the infant attained his majority. That emphasizes the distinction between the two interests. If this had been a contingent interest the accumulations would not have been assessable to sur-tax, because, in such a case, there would be no-one of whom it could be said that the income as it accrued was his interest. [LORD GREENE M.R. In a given year during the infancy of a person with a vested interest can you now say that the income is his income? Is not the position precisely the same as in the case of a contingent interest?] If judgment in tort were given against an infant with a vested interest, the judgment creditor could get a receiver. [LORD GREENE M.R. Only when the income became the income of the infant on his coming of age.] Can it be said that the effect of the Trustee Act, 1925, s. 31, sub-s. 2, is to change the whole tax position? It might have the most unfortunate result. Thus, the effect in respect of an infant's vested interest would be that the trustees could not obtain relief year by year in respect of the income expended. In the case of a small vested interest that might work hardly on the infant who could have less spent on his maintenance and remuneration when he most needed it. Section 31 only affects devolution and not the title denoted by the word "vested." A vested interest originally conferred

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(1) [1924] 2 K. B. 351; [1926] 1 K. B. 389.

(2) [1928] 1 K. B. 383, 393.

C. A.

1943

STANLEY
v.
INLAND
REVENUE
COM-
MISSIONERS.

ownership of the rent of a feudal estate and hence came the distinction between a vested interest and an interest contingent on the death of another person. From that arose the modern meaning of a vested interest, namely, possession without condition precedent. Unless s. 31 has altered that position, it ought not to be applied to affect the tax position. [They referred to *Gascoigne* v. *Inland Revenue Commissioners* (1).] The interpretation always given to " vested " remains the same and an infant with a vested interest has still a title to the property, however emasculated it may be. The appellant has attained his majority and is the undoubted owner of the property with the accumulations of income, and this appeal must be decided in the light of this fact : see *Smart* v. *Lincolnshire Sugar Co.* (2) and *Lincolnshire Sugar Co.* v. *Smart* (3) and *In re Bradberry* (4). In the circumstances which have happened the appellant has never been deprived of the income arising during his minority, and no change in the devolution has arisen from the passing of the Trustee Act, 1925, s. 31. [They also referred to *In re Turner's Will Trusts* (5).]

Roxburgh K.C. replied.

Cur. adv. vult.

1944. Jan. 24. The judgment of the court (LORD GREENE M.R., MACKINNON and GODDARD L.JJ.) was read by LORD GREENE M.R. The power to make additional assessments in respect of sur-tax is contained in s. 42, sub-s. 3, of the Finance Act, 1927. Sub-section 7 (*a*) of that section imports the provisions of the Income Tax Acts relating to assessments to income tax, and the relevant provision is that contained in the first paragraph of s. 125, sub-s. 1, of the Income Tax Act, 1918. Under that paragraph an additional assessment may be made " If the surveyor discovers that any properties or profits " chargeable to tax have been omitted from the first " assessments," and it was, apparently, under these provisions that the assessments in question were made. An additional assessment can only be made in respect of a particular year and it cannot be made unless an original assessment could lawfully have been made in respect of that year. There can be no such thing as a conditional assessment and the Crown can derive no support for its claim from the fact that it did not make the assessments until the title of the appellant to the accumulations became absolute when he attained his majority. If the Crown is right in its claim, it can only be for the reason that assessments could lawfully have been made year by year during the minority of the appellant in respect of the surplus income of the estate and the circumstance that, in the event, he in fact attained his majority is entirely irrelevant. In order that a person may be charged with sur-tax, the income in respect of which he is assessed must be his income. Under s. 38, sub-s. 1, of the Finance Act, 1927, the charge for sur-tax is only imposed "in the case of "an individual whose total income from all sources exceeds "a stated amount." By sub-s. 2, "total income" in relation to any person means "the total income of that person from "all sources" estimated as there provided. Apart from any special provision in the instrument under which an infant derives his interest and apart from statutory provisions, an infant who has a vested interest in possession is the person entitled to the income. It is his income although he cannot give a good receipt for it. On his death under twenty-one income which has accumulated during his minority goes to his legal personal representatives. In such a case there can be no doubt that the income accruing during minority is the income of the infant. He is, accordingly, chargeable with sur-tax in respect of it. A creditor who has lawfully obtained judgment against the infant, for example in an action of tort, can levy the appropriate form of execution against it. If, on the other hand, the infant is only entitled contingently on his attaining twenty-one he has no title to any income until that event takes place. If the event does take place, he becomes entitled to future income and (in appropriate circumstances) to accumulations of past income, but that past income was not his income in the years in which it accrued, and no one suggests that he could be assessed to sur-tax in respect of it.

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(1) [1927] 1 K. B. 594.

(2) (1935) 20 T. C. 643, 661, 665.

(3) [1937] A. C. 697, 705.

(4) [1943] Ch. 35, 42.

(5) [1937] Ch. 15, 26.

Section 42 of the Conveyancing Act, 1881, gave certain statutory powers and created certain statutory trusts in relation to the income of land in which an infant had a vested interest in possession. By sub-s. 5 of that section the title of the infant to accumulations of his income was preserved in the sense that, if he died under twenty-one, they went (in the absence of special provision) to his legal personal representatives as part of his estate. Here again, there could have been no doubt that the income of such an infant was his income assessable to sur-tax. His title to it was absolute throughout, although his power to enjoy it was suspended during his infancy. If he had become domiciled in a country where testamentary capacity is acquired at an earlier age than twenty-one he could have dealt with the accumulations by will. If the statutory trusts in the present case had been those contained in s. 42 of the Conveyancing Act, 1881, the appellant would clearly have had no case, but s. 31 of the Trustee Act, 1925, has effected a radical change in the law. It declares statutory trusts which, in the case of an infant with a vested interest in income who dies during minority, destroy his title to the accumulations and direct them to be held, not as part of the infant's estate, but as an accretion to capital. The section applies to property of any description held in trust for any person for any interests whatsoever, whether vested or contingent. It provides that during the infancy of any such person income may be applied for his maintenance, education or benefit and any income not so applied is to be accumulated with power to apply accumulations as income. Sub-section 2, so far as relevant, proceeds as follows: The Trustees "shall hold those accumulations as "follows: '(i.) If any such person (*a*) attains the age of "'twenty-one years, or marries under that age, and his "'interest in such income during his infancy or until his "'marriage is a vested interest; or (*b*)' (this is not relevant) "'. . . . the trustees shall hold the accumulations in trust "'for such person absolutely . . . . (ii.) In any other case "'the trustees shall, notwithstanding that such person had "'a vested interest in such income, hold the accumulations "'as an accretion to the capital of the property from which "'such accumulations arose . . . .'"

Some highly technical arguments were addressed to us on the question what precise interest in surplus income an infant having a vested interest enjoys during his infancy in view of these provisions. This, no doubt, is a relevant question, but the fundamental question remains, namely, is that interest such as to make the surplus income income of the infant for the purposes of sur-tax? It was said on behalf of the Crown that the infant has a vested interest in the surplus income as it accrues and that there is nothing in the section that deprives him of that interest during infancy—all that the section does is to divest him of his title to the accumulations of surplus income if he dies before attaining his majority. In other words, it was said, he has a vested interest in the accumulations which is defeasible in the event of his dying under twenty-one and, therefore, the surplus income is, during minority, income of the infant and as such is assessable year by year. It is necessary at this point to call attention to a distinction which apparently was not appreciated by the Special Commissioners. The expression " defeasible interest in income " may be used in two senses. In the case of an adult he receives and enjoys the income until the defeasance takes place. Until that event occurs the income is his income and he is assessable accordingly, but the same expression (if it be the correct one to use in reference to surplus income in such a case as the present) means, in the case of an infant in the situation of the appellant, something quite different. The infant does not during infancy enjoy the surplus income. It is not his in any real sense. The title to it is held in suspense to await the event, and if he dies under twenty-one his interest in it (whether or not it be truly described as a vested interest) is destroyed. He is, in fact, for all practical purposes in precisely the same position as if his interest in surplus income were contingent. If he attains twenty-one he takes the accumulations, if he dies under twenty-one he does not, but, as a matter of fact, the section itself does use words of contingency, since the trust of the accumulations is expressed to be for the infant " if he attains the age of twenty-one years or marries " under that age." We are disposed to think that the effect of the section is better described, not as leaving the interest of the infant as a vested interest subject to defeasance, but as engrafting on the vested interest originally conferred on the infant by the settlement or other disposition a qualifying trust of a special nature which confers on the infant a title to the accumulations if and only if he attains twenty-one or marries. The words in sub-s. 2 (i.) (*a*), " If his interest during " infancy or until his marriage is a vested interest," and the corresponding words in sub-s. 2 (ii.), " notwithstanding that " such person had a vested interest in such income," appear to us to refer to the nature of the interest conferred upon the infant by the settlement or other disposition and not to affirm that the interest of the infant in the surplus income remains a vested interest notwithstanding the alteration in his rights effected by the section. If this view is right, the interest of the appellant in the surplus income during his minority was a contingent interest only and he was not assessable.

But, even if this view is wrong and the interest of the infant in surplus income during his minority was technically in law a vested interest, the Crown's conclusion that this surplus income was, therefore, income of the infant for sur-tax purposes within the meaning of the Income Tax Acts is not, in our opinion, justified. As we have already said, the fundamental question is that of the construction of the words " income of a person " in those Acts in relation to the particular situation brought about by s. 31 of the Trustee Act. In our opinion, the effect of that section is to make the income of the settled property different for sur-tax purposes from what it would have been if the section had never been enacted and to remove it for those purposes from the category " income of " the infant." The rights of the infant in respect of this surplus income during infancy are, whatever their technical description, precisely what they would have been if they had been expressly made contingent. We need not repeat what we have already said in this connexion, but, if the Crown's contention be brought to the practical test, it means (and, indeed, it was conceded on behalf of the Crown) that in respect of every year during his infancy the infant is assessable to sur-tax in respect of income which may never in truth be his. As it is not possible to make a contingent assessment or to improve the position of the Crown by waiting until the infant attains twenty-one before making an assessment, and as, if the infant were to be assessed during infancy and were to die before attaining twenty-one, his legal personal representatives would have no right to recover the tax levied upon him, it necessarily follows (and it was conceded on behalf of the Crown) that on the Crown's argument the infant could be assessed to sur-tax in respect of income which, if he died under twenty-one, he would never receive. The Crown's claim in the present case would have been equally good if the appellant had died in infancy and the assessments had been made on his legal personal representatives. Moreover, the Crown was unable to give any acceptable answer to the question how the tax could be paid. It was indeed suggested that the Crown could have recourse to the accumulations in the hands of the trustees, but this answer begs the question. We do not see on what principle a claim by the Crown against the infant

C. A.
1944
STANLEY
v.
INLAND
REVENUE
COMMISSIONERS.

could defeat the rights conferred on the remainderman by s. 31 to have the accumulations added to capital for his benefit. An endeavour was made to support the argument by asserting that a judgment creditor of the infant could levy equitable execution against the accumulations while the infant was still an infant. This argument is in our opinion quite wrong. No claim against the infant can defeat the rights conferred upon the remainderman by the section. The result, therefore, would be that the only way in which the Crown could enforce its rights during the infancy would be against the separate property of the infant—if he had any-and his estate would thus be depleted to meet a claim for tax in respect of income which, if he died an infant, would never become his.

The real fallacy, if we may so describe it, which underlies the argument for the Crown is that it gives to the words " income of a person " in the relevant passage of the Income Tax Acts an entirely artificial meaning. Those words are to be construed in a common sense business way and we do not see how they can be stretched so as to include income which in no real sense can be described as income of the infant unless and until he attains his majority. The action of the Crown in refraining from making the assessments until it was ascertained that the title of the appellant had become absolute gives, at first sight, a colour of reasonableness to its claim and suggests that, if the infant had died under twenty-one, the claim would never have been put forward, but, once it is appreciated that the claim, if it be a good one, would have been equally good if the assessments had been made during the infancy and the appellant had died an infant, the fallacy, in our opinion, is convincingly exposed.

The only authority to which we need refer is *Gascoigne* v. *Inland Revenue Commissioners* (1). It was on this case that the Special Commissioners relied, and it was much pressed on us by counsel for the Crown. The decision, however, appears to us to be of no assistance in determining the present question. Miss Gascoigne had two interests under the will of her grandfather. The first was an absolute vested interest in certain property in Ireland subject to a direction to accumulate the rents during her infancy. The income of the property was hers from beginning to end and the direction to accumulate was mere administrative machinery which did not affect her

(1) [1927] 1 K. B. 594, 605.

C. A.
1944
Stanley
v.
Inland
Revenue
Com-
missioners.

title in any way. The other interest was an absolute interest in the residuary estate of the testator, subject to a gift over if she died under twenty-one without having been married. Rowlatt J., in his judgment, does not appear to refer to the position with regard to this interest, no doubt because it was quite unarguable that the income pending the defeasance was not income of Miss Gascoigne. It was, however, on this decision as it applied to the gift of residue, that the Special Commissioners based their conclusion, and it was here that they fell into the error to which we have already referred. Miss Gascoigne's interest in the residue was a defeasible interest in the first of the two senses mentioned earlier in this judgment. The income year by year was hers until the defeasance should take place. She could, of course, give no receipt for the income during her infancy, but, if she had died an infant, any income which had previously accrued and had not been spent on maintenance would have passed to her legal personal representatives as part of her estate. The appeal is allowed, with costs here and below.

Appeal allowed.

Solicitors: *Maples, Teesdale & Co.; Solicitor of Inland Revenue.*

H. C. G.

C. A.

1943
Dec. 13, 14.

DUDLEY v. DUDLEY.

Deed—"Payment of stated amount free of income tax"—Variation—Confirmation of covenant after September 3, 1939*—Finance Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.

The Finance Act, 1941, s. 25, sub-s. 1, provides: "Subject to "the provisions of this section, any provision, however worded, "for the payment, whether periodically or otherwise, of a stated "amount free of income tax, or free of income tax other than "surtax, being a provision which (*a*) is contained in any deed or "other instrument . . . . (*b*) was made before September 3, "1939; and (*c*) had not been varied on or after that date, shall, "as respects payments falling to be made during any year of "assessment, the standard rate of income tax of which is "ten shillings in the pound, have effect as if for the stated amount "there were substituted an amount equal to twenty twenty-ninths "thereof":—

Held, (1.) that the variation required under para. (*c*) to prevent the sub-section from applying to a covenant entered into before

September 3, 1939, for payment of a stated amount free of income tax is a variation made on or after that date of the stated amount and not of any collateral agreement; and (2.) that no mere affirmation of such a covenant will suffice.

APPEAL from Croom-Johnson J.

By a deed of separation, dated June 16, 1932, it was agreed that the plaintiff (the wife) and the defendant (the husband) should live apart and that the husband should pay to the wife during her life weekly in advance such a sum as, after the deduction of income tax for the time being payable in respect thereof, would leave a clear sum of 1*l*. 15*s*. a week. By a supplemental deed, dated September 20, 1939, the wife declared "(subject to the proviso hereinafter contained) that "she does not make any claim for tax deducted in arriving "at the amount of the said payments already made or that "shall hereafter be made under the principal deed." The proviso referred to was as follows: "Provided always . . . . "that the intention of the parties is that under no circumstances shall the wife receive less than the net amount of "1*l*. 15*s*. a week after payment or deduction of tax and that "the declaration of the wife . . . . shall not apply to any "payment in respect of which the wife shall be called upon to "bear or pay income tax and that should the wife at any "future date be called upon to bear or pay income tax in "respect of the receipt of the said sum of 1*l*. 15*s*. a week, the "husband will indemnify and reimburse his wife in respect "thereof." The supplemental deed was entered into in the following circumstances. The husband, in making his returns to the revenue authorities of total income for the purpose of obtaining allowances, had not referred to his obligation to pay his wife an annuity under the separation deed and had so obtained excessive allowances, contrary to s. 17 of the Income Tax Act, 1918. The wife had not, however, claimed to recover income tax in respect of her weekly payments as, in view of the amount of her income, she could have done. The inspector of taxes intimated that, if the wife would waive any claim to repayment of tax in respect of the weekly sum of 1*l*. 15*s*. for the past and the future, he would allow the husband to obtain allowances as theretofore. The supplementary deed was executed for this purpose, and the proviso in the deed was inserted to secure to the wife the minimum sum of 1*l*. 15*s*. a week in any altered conditions. Subsequently, revenue authorities superior to the inspector of taxes decided that, while the claims against the husband up to the years 1938/9 might be waived, it was impossible to carry on the arrangement after that date. Notwithstanding the passing of the Finance Act, 1941, s. 25, sub-s. 1, reducing in certain cases the amount payable in respect of annuities payable free of income tax, the husband continued to pay the full net weekly payments of 1*l.* 15*s.* until June 22, 1942, and then, in the belief that he ought only to have paid twenty twenty-ninths of the weekly sum of 1*l.* 15*s.* as from April 5, 1941, he stopped all further payments of the weekly sum as from that date. On April 30, 1943, the wife brought proceedings to recover 73*l.* 10*s.*, being the weekly sums unpaid, but the husband only admitted liability of 3*l.* 4*s.* 3*d.* which he paid into court. Croom-Johnson J. gave judgment in favour of the wife for 16*l.* 11*s.* 10*d.* only, being the amount in fact due to her down to the beginning of the action on the footing that the Finance Act, 1941, s. 25, sub-s. 1, applied. The wife appealed.

Seuffert for the wife. The husband was not entitled to reduce the net weekly sum payable under s. 25, sub-s. 1, of the Finance Act, 1941. By the supplemental deed the wife abandoned her right to reclaim income tax for the benefit of the husband, and, although that benefit has only partially enured to him, it would not be right to reduce the net weekly payments. The supplemental deed has varied the earlier deed, and that earlier deed has, therefore, been varied after September 3, 1939, within the meaning of s. 25, sub-s. 1, and the full net weekly sum is payable. [He was stopped.]

F. H. Lawton for the husband. The intention of s. 25, sub-s. 1, seems to have been that the heavy burden of taxation should be distributed between payer and payee. The only case in which s. 25, sub-s. 1, does not apply, so long as income tax remains at 10*s.*, is where, after the date of the commencement of the war, the agreement to pay an annuity free of income tax has been varied in view of the prospective burden of taxation. That variation must be of " the stated " amount " payable free of income tax, and this supplemental deed has made no such variation. All that the wife did was to abandon her right to recover income tax to enable the husband to obtain some allowance in respect of tax to which he was not strictly entitled. The position is exactly as it was before the execution of the supplemental deed. A variation

C. A.
1943
DUDLEY
v.
DUDLEY.

of a collateral provision is not a variation within the sub-section: see *Cobbold* v. *Davenport* (1). Section 25, sub-s. 1, is very narrow. It is not enough that the agreement to pay a stated amount free of tax should be confirmed after September 3, 1939. It must be varied and in the present case there was no such variation. [He also referred to *In re Hawkins* (2).]

Seuffert in reply. There has been a variation of the stated amount because the wife, by giving up her right to recover income tax, would get under s. 25, sub-s. 1, only twenty twenty-ninths of 1*l*. 15*s*. a week instead of twenty twenty-ninths of this weekly sum together with the tax.

LORD GREENE M.R. The question in this case arises under the Finance Act, 1941, s. 25, sub-s. 1, the object of which is to remedy the hardship caused by the great increase in the rate of income tax to persons who, before the war, had bound themselves to pay annual sums free of tax. The sub-section secures the division of the increased burden of tax between the payer and payee in a way thought equitable by the legislature, not by reallocating the tax in any way, but by writing down the amount of the net sum to be paid. Therefore, it is not true in law, although it may be true in substance, to say that by this statute the payee has a burden of tax cast on him. He has the net amount to be paid to him reduced by a conventional figure. The sub-section applies to a covenant in the present form by reason of s. 27, sub-s. 1.

It is to be noticed particularly that s. 25, sub-s. 1, deals with what is described as a "provision . . . . for the "payment . . . . of a stated amount free of income tax," and it is not to apply where that provision was made or varied after September 3, 1939. There can be no question that the covenant in the original separation deed was a provision for the payment of a stated amount free of income tax made before September 3, 1939, and, but for the supplemental deed, no question would arise that the liability of the covenantor would, accordingly, be scaled down to twenty twenty-ninths of 1*l*. 15*s*. a week. For s. 25, sub-s. 1, to apply, it must be possible to predicate of the provision for the payment of the stated amount that it has not been varied on or after September 3, 1939. In this case it is said, on the one side, to have been varied by the supplemental deed, and on the other side not to have been so varied. It might have been expected that the sub-section would exclude from its operation any case where a covenant entered into before September 3, 1939, had been recognized after that date to be still binding. It would naturally be thought that, if the parties had affirmed the covenant, after September 3, 1939, that would be sufficient to take the case out of the sub-section, because it could have been said that the parties, with the practical certainty of increased taxation before their eyes, had, nevertheless, affirmed the liability originally cast on the covenantor. The legislature, however, has not thought fit to word the sub-section in that way, and to take a case out of it, a variation, and not merely a confirmation, is needed. A mere re-statement or confirmation of an existing obligation cannot be treated as a variation of the provision within the meaning of the sub-section.

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(1) [1942] 2 All E. R. 291.

(2) (1942) 59 T. L. R. 105.

The variation must be of the provision for the payment of the stated amount, and the question whether or not there has been a variation must, in my view, be examined without any reference to the Act. In other words, we must look at the original provision simply as a contractual obligation, and then look at the alleged variation regarded again as a contractual obligation and ask ourselves the question: Has the later provision varied the earlier? If, as a result of that examination, we find that the later obligation has introduced no variation in the original provision, then we cannot bring the case within para. (*c*) of the sub-section.

That brings me to the supplemental deed. First, it is said that the undertaking by the wife not to make a claim against the revenue authorities for return of tax deducted is a variation of the provision for the payment of 1*l*. 15*s*. I cannot so regard it. The obligation remains exactly as it was before, namely, to pay a gross sum of 1*l*. 15*s*. plus x, an obligation which, as between the covenantor and covenantee, is satisfied by paying 1*l*. 15*s*. to the covenantee and x to the revenue. The undertaking by the wife does not in any way affect the husband's obligation to make the payment. It is merely an arrangement by which the wife agrees not to make against the revenue a claim which she is entitled to make on the footing that too much tax has been paid in respect of her income. Then it is said that, if that argument be not right, nevertheless the supplemental deed has the effect of imposing

C. A.
1943
DUDLEY
v.
DUDLEY.
Lord Greene M.R.

on the covenantor a covenant that in no circumstances shall the wife receive less than the net amount of 1*l.* 15*s.* a week after payment or deduction of tax. That, however, is precisely what the covenantor covenanted by the separation deed. Regarded purely from a contractual point of view, these provisions of the supplemental deed neither add to nor detract from the existing obligation of the husband to pay a gross sum which will leave the wife with a net sum of 1*l.* 15*s.* a week. This part of the supplemental deed is nothing more than a re-affirmation of an existing obligation, inserted as a proviso to an undertaking by the wife not to make a claim against the revenue, the effect of which would have been to upset the arrangement which the husband was proposing to make with the inspector of taxes. This document cannot be construed as amounting to a variation of the provision for the payment of 1*l.* 15*s.* a week free of tax.

In my opinion, therefore, s. 25, sub-s. 1, applies and the husband is entitled to discharge his liability to the wife on payment of twenty twenty-ninths of 1*l.* 15*s.* That disposes of the question at issue in accordance with the decision of the learned judge, although his approach to the matter was different, largely because he had not before him the circumstances in sufficient detail to make it clear to him how the supplemental deed came to be executed.

MACKINNON L.J. I agree.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors: *Church, Rendell & Co., for Percy H. Chappell, Stourbridge; Haslewood, Hare & Co., for Higgs & Sons, Brierley Hill, Staffs.*

H. C. G.

BROUGHTON *v.* WHITTAKER.

1944
Jan. 18, 19.

Food and drugs—Article not of nature, substance, or quality demanded—Prejudice of purchaser—Evidence—Character of article—No statutory standard of quality—Evidence of public analyst—No evidence to the contrary—" Cordial "—Meaning—Food and Drugs Act, 1938 (1 *or* 2 *Geo.* 6, *c.* 56), *s.* 3, *sub-s.* 1.

Where, on a prosecution under s. 3, sub-s. 1, of the Food and Drugs Act, 1938, for selling a food which is not of the nature, substance and quality demanded by the purchaser, there is no fixed standard of quality for the article of food, and the public analyst who has given a certificate of analysis of the sample of the food purchased gives evidence, the court, in forming their own standard of quality, in the absence of evidence qualifying or contradicting the evidence of the analyst, must accept the statements of fact and opinion expressed in that evidence.

Bowker v. *Woodroffe* [1928] 1 K. B. 217, followed.

Collins Arden Products Ld. v. *Barking Corporation and Another* [1943] K. B. 419, distinguished.

CASE stated by Sunderland justices.

At a court of summary jurisdiction sitting at Sunderland, on April 19, 1943, an information was preferred by the appellant, chief sanitary inspector of the county borough, which charged that on the March 1, 1943, the respondent did sell at 60 Fawcett Street in the borough, to the prejudice of the purchaser, a food, to wit, a sweetened lemon flavouring cordial, which was not of the nature, substance and quality of the food demanded by the purchaser, contrary to s. 3, sub-s. 1, of the Food and Drugs Act, 1938.

The following facts were proved or admitted. On March 1, 1943, Percival Edward Budd, a qualified inspector under the Food and Drugs Act, 1938, purchased, at a price of 8½*d.* a bottle, two bottles labelled "sweetened lemon flavouring "cordial, not made from lemons," at a price of 10*d.* each, for analysis, at the shop, 60 Fawcett Street, Sunderland, occupied by the respondent. All the required formalities under the Act were complied with. In his certificate of analysis of the liquid contained in the bottles purchased, W. Gordon Carey, public analyst for Sunderland, expressed the opinion that the sample was not a cordial. Mr. Carey was called by the appellant and gave evidence that the beverage could not be termed a cordial. A fruit cordial, he said, contained the juice of the fruit and sugar, and this beverage contained neither alcohol nor sugar. It had no food value or restorative effect. The essential oil (oil of lemon) present would give a lemon flavour, but the sweetening present would not admit of any dilution. On dilution, it would practically disappear. A cordial, properly so called, should be concentrated and capable of being diluted. The solicitor for the respondent called no evidence, and he submitted that the evidence of Mr. Carey alone could not satisfy the court that the beverage had been sold to the prejudice of the purchaser.

The justices expressed the opinion that the evidence of

Mr. Carey was not proof that, when an ordinary person purchased a beverage marked " cordial " he meant to purchase a beverage which contained alcohol or a beverage which contained sugar, and, therefore, that it had not been proved that the beverage sold was not of the nature, substance, or quality demanded by the purchaser, and they dismissed the information.

Beyfus K. C. and *Vernon Gattie* for appellant. The decision of the justices was wrong. They were induced to regard the decision in *Collins Arden Products Ld.* v. *Barking Corportion* (1) as laying down a principle which would decide all subsequent questions of fact of a similar, though not the same, character. The justices held that they could not decide against the respondent on the technical evidence of the analyst, but that, as suggested in *Collins Arden Products Ld.* v. *Barking Corporation* (1), what they had to consider was what would an ordinary person expect to get who asked for a cordial, and that, as an ordinary person would be quite ignorant of its constituents, he would not be prejudiced if it did not contain sugar as an ingredient. If, however, a purchaser asked for vinegar the amount of acid required to be in the particular commodity, would be a matter of which he would be completely ignorant. All that can be done in an ordinary case where there is no standard fixed by statute is to call technical evidence to prove what in fact is meant in the ordinary course by the word used by the purchaser and the best technical evidence on that issue is that of the public analyst. The questions to be considered are (1.) Was a cordial asked for ? (2.) What was meant by the word " cordial " ? (3.) Was what was delivered a cordial within the ordinary meaning of the term ? Where the analyst is called and no evidence is called on the other side, the evidence of the analyst is to be accepted : *Bowker* v. *Woodroffe* (2) ; see also *Pearks, Gunston, and Tee Ld.* v. *Ward* (3).

R. E. L. Parry for respondent. The justices were right. In *Collins Arden Products Ld.* v. *Barking Corporation* (1), the court held that it was not sufficient that the public analyst should express the opinion that a liquid which contained no sugar or alcohol to give it a heartening effect " could not

(1) [1943] K. B. 419.
(2) [1928] 1 K. B. 217.
(3) [1902] 2 K. B. 1.

1944

BROUGHTON v. WHITTAKER.

"properly be described as a cordial," though Charles J. observed that, if the public analyst had said that non-alcoholic cordials must contain a substantial quantity of sugar, the position might have been different. The Divisional Court in that case must have taken the view that the evidence of the public analyst in that case was unsatisfactory. The analyst in that case (1) and the analyst in the present case gave evidence to the same effect that a "cordial" should contain either alcohol or sugar. In *Bowker* v. *Woodroffe* (2) the liquid sold was an "extract of meat and malt wine," and the analyst by his certificate said that the sample was deficient of at least sixty per cent. of the minimum amount of meat and malt extract and was entirely deficient of wine. That case can be distinguished from this since there, it was plain, that the public had been defrauded.

LAWRENCE J. Mr. Gordon Carey, the public analyst, gave evidence for the appellant before the justices and said that the beverage could not be termed a cordial as it contained no sugar and later said that the beverage was not a cordial as it contained neither alcohol nor sugar. He also relied upon the fact that the beverage was not concentrated or capable of being diluted. In answer to that evidence the respondent elected to call no evidence.

The appellant has pointed out that *Bowker* v. *Woodroffe* (2) was not cited to the justices, and he contends that, on the only evidence before the justices—that of Mr. Carey—there was only one course open to them, and that was to hold that there had been a contravention of s. 3, sub-s. 1, of the Food and Drugs Act, 1938. The head-note of *Bowker* v. *Woodroffe* (2) is: "On a charge of selling to the prejudice "of the purchaser an article of food not of the nature, substance "and quality demanded, under s. 6 of the Sale of Food and "Drugs Act, 1875, there being no fixed standard of quality "for the article, the justices must form a standard of their "own based upon the evidence before them, and, in the "absence of evidence to the contrary, should accept the "statements of fact in the analyst's certificate, including "(per Shearman J.) his expressions of opinion therein." The judgment of Lord Hewart C.J., justifies that head-note. He said (3) that the analyst who had given the certificate which

(1) [1943] K.B. 419.
(2) [1928] 1 K. B. 217.
(3) Ibid. 221.

1944

BROUGHTON
v.
WHITTAKER.

Lawrence J.

was offered in evidence in that case had stated that: "a "genuine meat and malt wine should contain at least five per "cent. of a mixture of equal parts of meat and malt extracts "with a wine basis," and that the sample of meat and malt wine did not contain that and was not a meat and malt wine. At the close of his judgment he said (1), the respondent not having tendered any evidence: "I think it was the duty of the magis-"trate to say that this mixture fell below the standard accord-"ing to the only evidence worth regarding of the true nature, "substance and quality of extract of meat and malt wine." The Lord Chief Justice also said (2): "I think the matter is made "quite clear by two cases. One is the case of *Harrison* v. "*Richards* (3) where Lindley J., as he then was, said (4): "'The magistrate in this case seems to have treated the "'certificate as matter of opinion and not of fact. He sets "'out his own opinion against the certificate, but I think "'that cannot be done, for the certificate is prima facie "'evidence, and it could not be thrown over merely by an "'opinion not founded on the evidence. No evidence was "'given to contradict the certificate'." That was a case in which the certificate of the analyst only had been put in evidence and the analyst had not been called, but the court held that the magistrate ought to have convicted on that certificate. Lord Hewart C.J., continued: "That was "a certificate in which the constituent elements having been "set out, the analyst said: 'I am of opinion the same is "'a sample of milk adulterated with twenty per cent. of "'water.' That case was in the year 1881. In the much "more recent case of *Robinson* v. *Newman* (5) it was said "by this court (per Lord Reading C.J.): 'The magistrates "'have to act upon the certificate of the analyst, which "'appears to be in the form in the schedule to the Act. The "'observation inserted in the certificate is justified by the "'note in the form in the schedule, and I do not think it is "'necessary to say more than that the analyst was entitled to "'express his opinion, and in the absence of a request that he "'should be called as a witness or of evidence to the contrary, "'the justices should have acted upon it. The case of "'*Harrison* v. *Richards* (3) is in point and the appeal must be "'allowed'." Lord Hewart C.J. adopted the views expressed by Lindley J., and Lord Reading C.J. in those cases and came to the conclusion in *Bowker* v. *Woodroffe* (1) that the magistrate ought to have adopted the opinion of the analyst stated in his certificate in the absence of evidence contradicting it. Avory J. came to the same conclusion. He said (2): "This certificate "upon its face, states as a fact that this article, which has "been analysed, is not a meat and malt wine. In the "absence of any evidence qualifying or contradicting that "statement of fact, I think it was the duty of the learned "magistrate to find that the article which had been sold "had been sold to the prejudice of the purchaser." Shearman J. also came to the same conclusion. Having referred to *Harrison* v. *Richards* (3) and *Robinson* v. *Newman* (4), he said (5): "It is quite clearly laid down in both those cases—"I do not think it is possible to discriminate—that the "analyst is entitled to express his opinion as to what the "standard should be, and if that is uncontradicted, the "magistrates are bound to accept it." The authority of *Bowker* v. *Woodroffe* (1) appears to be quite clear.

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(1) [1928] 1 K. B. 224.
(2) Ibid. 223.
(3) (1881) 45 J. P. 552.
(4) Ibid. 553.
(5) (1917) 81 J. P. 187.

In *Collins Arden Products Ld.* v. *Barking Corporation* (6) the analyst who had made the analysis and put in his certificate was called and gave evidence. He was dealing there with a liquid described as, "orange citric flavoured "cordial," but his evidence was met by the seller of the cordial with the evidence of three other expert analysts who said that in their opinion the liquid was not improperly described. Unfortunately, it does not appear that *Bowker* v. *Woodroffe* (1) was there cited, but, in any event, the facts of that case differed from those in *Bowker* v. *Woodroffe* (1), and from those in this case, because in *Collins Arden Products Ld.* v. *Barking Corporation* (6) there was a conflict of evidence. It has been strenuously argued that the only basis on which the Divisional Court in *Collins Arden Products Ld.* v. *Barking Corporation* (6) could have come to the conclusion that they ought to overrule the justices was on the view that the evidence of the public analyst, who gave the certificate, was not satisfactory evidence and was not evidence on which a court could act, and, it was said, this observation applies to the evidence of Mr. Carey in the present case. In my opinion, it is an unsatisfactory way of arguing from one case

(1) [1928] 1 K. B. 217.
(2) Ibid. 225.
(3) 45 J. P. 552.
(4) 81 J. P. 87.
(5) [1928] 1 K. B. 226.
(6) [1943] K. B. 419.

to another to say that because certain evidence in one case has been treated as unsatisfactory, other evidence in another case, which cannot be identical, is also so unsatisfactory that it ought not to be acted on. Particularly is that so, where in the earlier case there is a strong conflict of evidence and in the later, the evidence stands uncontradicted. I do not find that the evidence of the analyst who gave the certificate in *Collins Arden Products Ld.* v. *Barking Corporation* (1) is identical with the evidence of Mr. Carey in the present case. In my opinion, *Collins Arden Products Ld.* v. *Barking Corporation* (1) ought to be regarded, as Charles J. said, " as " exceptional in many circumstances," and it ought not to be held by this court as binding them to disregard the clear authority of *Bowker* v. *Woodroffe* (2), following the two decisions of *Harrison* v. *Richards* (3) and *Robinson* v. *Newman* (4).

For these reasons, I think that this case ought to be remitted to the justices with our direction that on the evidence they ought to find the offence proved.

LEWIS J. I agree.

WROTTESLEY J. I agree.

Case remitted.

Solicitors for appellant: *Sharpe, Pritchard & Co., for G. S. McIntire, town clerk, Sunderland.*

Solicitors for respondent: *Maude and Tunnicliffe, for Morton and Morton, Sunderland.*

(1) [1943] K. B. 419.
(2) [1928] 1 K. B. 217.
(3) 45 J. P. 552.
(4) 81 J. P. 187.

C. G. M.

HOLMES *v.* HADFIELDS, LIMITED.

C. A.
1944
Jan. 18, 19.

Factory Acts—Travelling crane—Place of working—Approach within twenty feet—Contributory negligence—Workman's signal misunderstood by driver—Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 24, *sub-s.* 7.

The plaintiff worked in a part of the defendants' factory where overhead travelling cranes were employed. He had been working on a drill on a platform sixteen feet above the floor, and, when a crane approached, he left the drill in position and climbed down to a girder halfway between the platform and the floor where he was not liable to be struck by the crane itself. He then signalled the driver of the crane to proceed, expecting her to stop at the edge of the platform and make sure that there was sufficient clearance. The driver misunderstood his signal and went straight on, knocking over the drill which fell on and injured the plaintiff :—

Held, that the defendants had been guilty of a breach of their statutory duty under s. 24, sub-s. 7, of the Factories Act, 1937, in that the crane had approached within twenty feet of the place where the plaintiff was working, which included, not only the platform, but also the girder below. The duty imposed by s. 24, sub-s. 7, was absolute, and extended to the whole area in which a man was working and not only to the precise point where he might be at any given moment :—

Held, also that if employers, while failing in that statutory duty, allowed their workmen to substitute for the protection laid down by the Act a private system of signals and warnings, the breakdown of that system through failure to understand a signal afforded no evidence of contributory negligence on the part of an injured workman.

APPEAL from Rotherham county court.

The plaintiff, Holmes, a workman employed by the defendants, Hadfields, Ld., claimed damages for alleged breach of statutory duty, under s. 24, sub-s. 7, of the Factories Act, 1937 (1), in that an overhead travelling crane used in the defendants' factory approached within twenty feet of the place where he was working and caused him injury. The plaintiff, with others, was working a ratchet drill on a platform about sixteen feet above the floor in a part of the defendants' works where three overhead cranes were employed. One of the cranes had made several journeys past the place where the plaintiff was working. As the crane which caused the accident approached, the plaintiff climbed down to a girder halfway between the platform and the floor, and signalled to the crane driver to proceed. The practice on twenty-four previous journeys of the crane had been for the driver to stop about a foot from the platform and to make sure that any tools or other obstructions to her safe passage were removed. On the twenty-fifth occasion, the plaintiff, not knowing that the driver had already stopped a few feet away, expected her to stop as usual, but the driver took his signal as permission to pass, and went straight on. The cab of the crane hit the ratchet drill which had been left in position on the platform, and it fell and injured the plaintiff. The county court judge found that the defendants had been guilty of a breach of statutory duty in that the crane had approached within twenty feet of the place where the plaintiff was working, but that the plaintiff had been guilty of contributory negligence in leaving the drill in position and signalling the driver to go on. He gave judgment for the defendants, and the plaintiff appealed.

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(1) By the Factories Act, 1937, s. 24, sub-s. 7 : "If any person is "employed or working on or near "the wheel-track of an overhead "travelling crane in any place "where he would be liable to be "struck by the crane, effective "measures shall be taken by "warning the driver of the crane "or otherwise to ensure that the "crane does not approach within "twenty feet of that place."

Gerald Gardiner for the plaintiff. Section 24, sub-s. 7, imposes an absolute duty: *Lotinga* v. *North Eastern Marine Engineering Co. (1938) Ld.* (1). The defendants made no attempt to fulfil it, but substituted an unauthorized system of warnings which was likely to lead to misunderstandings. There was no evidence of contributory negligence by the plaintiff. In view of the practice to stop and see that obstructions were removed, it was not negligent either to leave the drill in position or to signal the driver to approach. It was unfortunate that the driver misunderstood the signal, but the cause of the accident was the breach of statutory duty by the defendants.

Streatfeild K.C. and *Fletcher Moulton* for the defendants. The sub-section is intended to protect people from the danger of being struck by a travelling crane. The plaintiff was not struck by the crane. He had left his place of working "where "he would be liable to be struck by the crane" and had got down on to another girder. It would have been the same if he had got behind a column where he could not be hit. If the plaintiff had been ordered away from his place of work, instead of leaving it voluntarily, the crane could properly have passed. Even if there was a breach of the statutory duty, there is no evidence that it was the cause of the accident. The plaintiff was hit, not by the crane, but by the drill which he had negligently left in the way of the crane, which knocked it over. There was evidence to support the finding of contributory negligence.

Gardiner in reply. A man's "place of working" is not confined to the precise spot on which he stands, but extends to the whole area in which his work is to be performed. Here the girder to which he moved for safety was part of his "place "of working." Nor can it be material whether the injury is caused by direct impact of the crane, or by some object knocked over by the crane.

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(1) [1941] 2 K. B. 399.

LORD GREENE M.R. Section 24, sub-s. 7, of the Factories Act, 1937, like so many of the directions in the factories legislation, imposes an absolute duty. The absolute duty under these Acts is so familiar that I need say no more about it. The county court judge came to the conclusion that the defendants had been guilty of a breach of the statutory obligation imposed on them by this sub-section. There is no question but that the platform on which the man was working was a place where he would be liable to be struck by the crane, nor that the crane did approach within twenty feet of that place, because it passed the platform, and as it passed, the cab hit the ratchet drill which fell on the plaintiff. It was, however, argued on behalf of the defendants that the judge must have misdirected himself in law for the reason that at the precise moment when the crane moved and had started its last movement it was some seven or eight feet away from the platform. At that moment, it is said, the plaintiff was not working in a place where he would be liable to be struck by the crane, though he was liable to be struck by the tools he was using if the crane hit them as it did. It is said that that is not what the section means, but that the worker must be employed in a place where he would be liable to be struck by the crane itself. In my opinion, that argument involves placing much too narrow a construction on this sub-section. The place where the plaintiff was employed comprised both the platform and the girder on which he stood. The fact that at the time of the accident his actual position was one in which the crane would not, in fact, strike him seems to me to be immaterial. The crane came within twenty feet of the place where he was employed, and the defendants cannot excuse themselves by saying that at the precise moment when the crane moved he was in a part of that place where he was not liable to be struck. If that argument were to prevail, it seems to me that the protection of the section would be whittled away very materially in practice. If a man's place of employment is partly within the twenty feet and partly outside the twenty feet, he may be at any given moment at one part or the other. The object of the sub-section is to lay down an absolute rule of safety and not to make the obligation of the employer dependent on the precise point where the workman may be at any given moment. In my view, there was ample evidence on which the judge could come to the conclusion he did on this point, and I cannot find that he in any way misdirected himself as to the true meaning of the section. The judge, however, found against the plaintiff on the ground that he was guilty of contributory negligence. His finding is as follows: " I hold that the injury was occasioned by the " contributory negligence of the plaintiff. He was responsible " for the operations going on on the platform. He and his " mates were given ample time to clear the platform and take " cover, and he knew that the drill had been left in position, " and he gave warning to the crane driver that all was clear " and that it was safe for her to go on." In my opinion, the facts here are not sufficient in law to support a finding of contributory negligence. It appeared that the defendants, on the breach of their statutory obligation by allowing these cranes to come within twenty feet of the place of work, either had set up themselves, or had allowed to be set up, a sort of private or substituted safety scheme, under which warnings or signals were given to come on or stop, but an employer who fails to conform to the statutory obligation of safety and allows it to be replaced by some private safety system of his own or one which the men are allowed to work out for themselves, does so at his peril. If that system depends on the accurate giving and understanding of signals which are liable to be misunderstood, and if a signal is given by the workman under a misapprehension as to how it will be understood by the person to whom it is given, it is impossible to say that the workman is guilty of contributory negligence. The only thing of which the plaintiff could be accused was that he gave the signal without having full knowledge of the situation. That is not blameworthy in any relevant way. Indeed, sooner or later, a safety system of this kind, which depends on signals, is almost sure to lead to misunderstandings. In my opinion, there was no evidence on which the finding of contributory negligence could be supported. The result, therefore, is that the appeal succeeds on the question of liability.

MacKinnon L.J. I agree

DU PARCQ L.J. I agree. The only matters which it becomes necessary to decide are these: (1.) Was the judge right in coming to the conclusion that there had been a breach of statutory duty and that the plaintiff suffered damage by reason of that breach? and, (2.) was there evidence to support his finding of contributory negligence on the part of the plaintiff? As to the second question, I have nothing to add to what has been said by the Master of the Rolls. It is common ground that this accident happened to the plaintiff through a misunderstanding, and I cannot see that any blame is to be attached to the plaintiff for that misunderstanding.

The other question deals with a matter which might in other cases, no doubt, raise difficult problems, but I think that the difficulty will usually be occasioned rather by the facts than by any question of construction. I suggested to Mr. Gardiner in the course of his argument that it would often be a question of degree whether a man could be said to be employed or working in any place where he "would be "liable to be struck by the crane." It may be said, I suppose, of most men working in a factory, that their work is within some area. As Mr. Gardiner said, the place where a man is working is not the piece of ground occupied by his two feet or the space taken up by his whole body. It is the area within which his work requires him to move about, and the work which for the time being he is doing is the work at which one must look to see what that area is. If one were to say that the moment a man absented himself from that area he was to be regarded as ceasing to be employed or working there, the result might be terrible indeed, because the time when the man has temporarily gone away for some legitimate purpose of his own may be the very moment when the crane driver elects to drive on, perhaps just in time to catch the man when he is returning without suspicion of the danger that awaits him. The question is:—What is the area within which his work requires that he should for the time being be, not as a stationary object, but as a sentient human being who from moment to moment may change his position within it, or may temporarily go outside it with the intention of shortly returning?

On that view of the matter, it is enough to say that the judge was fully justified in saying that there was a breach of statutory duty. That only leaves the question whether the damage suffered was occasioned by the breach of statutory duty. Mr. Streatfeild suggested that it was not because the man was never struck by the crane, and, in the position in which he was, could not have been struck by the crane. He was struck by the drill which the crane dislodged. I do not forget that when one is dealing with a breach of statutory duty one cannot hold the defendants liable because, by reason of their failure to perform that duty, some injury was suffered by the plaintiff, unless it is also shown that the injury suffered by the plaintiff was an injury of the kind which was contemplated by the statute. I do no more than allude to the well-known case of *Gorris* v. *Scott* (1), which lays down that principle, but, when one looks to see what was in the contemplation of the legislature, it is plainly impossible to say that the injury which was suffered by the plaintiff was not the kind of injury which was in the contemplation of Parliament. This section is in Part II. of the Factories Act, 1937, which deals with the safety of workmen. Parliament has been at pains to provide for the safety of workmen by allowing what certainly is a reasonable margin, and has said that the crane is not to approach within twenty feet of the place where the man is working, and if the question is asked whether Parliament was only thinking of the danger of the crane itself striking the workman or had also in contemplation the possibility that the crane might go so close to the workman and his immediate surroundings that it would strike some object near him whereby he might suffer injury, the answer, I think, can only be that Parliament must be assumed to have contemplated the latter possibility, which any reasonable person would contemplate. I agree that this appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff : *W. H. Thompson.*

Solicitors for defendants : *Corbin, Greener & Cook, for Arthur Neal, Scorah & Co., Sheffield.*

(1) (1874) L. R. 9 Ex. 125.

J. W. H.

C. A.

1944

Jan. 11, 12.

REX *v.* ARCHBISHOP OF CANTERBURY.

Ex parte MORANT.

Ecclesiastical law — Presentation to benefice — Failure of patron to obtain consent of churchwardens—Application by patron for bishop's approval—Approval of bishop not given to presentee—Decision of bishop reviewed by archbishop—Refusal of archbishop to hear whole case—Non-disclosure of confidential documents—" Review "—Lis inter partes—Quasi-judicial proceedings—Benefices (Exercise of Rights of Presentation) Measure, 1931 (21 *&* 22 *Geo.* 5, *No.* 3), *s.* 3, *sub-s.* 1 (*b*).

In view of the existence of a vacancy in a benefice the parochial church council passed a resolution under s. 3 of the Benefices (Exercise of Rights of Presentation) Measure, 1931, that the provisions of s. 3, sub-s. 2, should apply. Accordingly, on the failure of the churchwardens to agree to a proposed presentation, it became necessary for the patron to obtain the bishop's approval and on his refusing to give it the patron appealed to the archbishop for a "review" of the bishop's decision under s. 3, sub-s. 2 (ii.), proviso (*b*). The archbishop, who had declined to allow the patron to be represented by counsel and had not disclosed to the patron documents before him, upheld the bishop's decision. The patron applied for an order of certiorari to quash the archbishop's decision and for an order of mandamus to direct the archbishop to hear and determine all issues of law and fact and to receive all relevant evidence and permit the patron to appear by counsel :—

Held, that the archbishop, like the bishop before him, was not exercising a function analogous to that of a person hearing a lis inter partes and that he was not under an obligation to act in a quasi-judicial manner; and that both the bishop and the archbishop had a task to perform which required the very nicest tact and the utmost discretion and it would be wrong to require them to make known matters before them, the publication of which might do an infinity of harm.

Decision of Divisional Court [1943] W. N. 241 affirmed.

APPEAL from the Divisional Court (1).

In 1911, the applicant, the Revd. George Edward Morant, was presented to the parish of Batcombe-cum-Upton Noble in the diocese of Bath and Wells by his father as the owner of the advowson for that parish, and he was rector of the parish from 1911 to 1926. His father had died in 1921 leaving him the advowson but providing that in the final distribution of

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(1) [1943] W. N. 241.

C. A.

1944

REX
v.
ARCHBISHOP
OF CANTERBURY.
Ex parte
MORANT.

the estate he was to be debited with the sum of 2,500*l.* in respect of it. In 1926 the applicant undertook missionary work in India and presented the Revd. W. H. Haviland to the living. At the end of September, 1942, Mr. Haviland retired. The applicant had meanwhile returned to England, and, on Mr. Haviland's retirement, he presented himself to the Bishop of Bath and Wells for institution as rector of Batcombe. In June, 1942, the parochial church council of the parish passed a resolution under s. 3 of the Benefices (Exercise of Rights of Presentation) Measure, 1931 (1), that the provisions of s. 3, sub-s. 2, should have effect, and, on the failure of the churchwardens to agree to the proposed presentation, it became necessary to seek the bishop's approval. The parochial church council then passed a further resolution under s. 3, sub-s. 2 (ii.), proviso (*a*), of the Measure requiring the bishop to consult the body of advisers established by the Measure before giving or withholding his approval of any clerk presented to the parish. The bishop, having interviewed the applicant, who also went before the body of advisers, refused to approve the presentation. In March, 1943, the applicant appealed to the Archbishop of Canterbury for a review of the bishop's decision under s. 3, sub-s. 2 (ii.), proviso (*b*), of the Measure. The applicant asked to be represented by counsel on the hearing of the review which, he contended, was an appeal against the bishop's decision. The archbishop took the view, acting on legal advice, that the review was not an appeal or quasi-judicial hearing and that all he had to do was to talk the matter over with the applicant as patron. He, therefore, refused to allow the applicant to be represented by counsel, but he allowed him to be accompanied by Mr. Vaisey K.C. as a friend. On the instructions of the archbishop, the applicant caused a memorandum to be prepared setting forth the grounds of complaint against the decision of the bishop (who had died), and with it was supplied a petition signed by a large number of parishioners of Batcombe begging that the applicant might be allowed to return to the parish. All the relevant documents, including those submitted by the applicant, were laid before the archbishop. On June 14, 1943, the archbishop saw the applicant and Mr. Vaisey K.C., and, after a further interview with Mr. Vaisey K.C. alone, he wrote to the applicant on June 24, 1943, as follows : " I have " been giving the most careful attention that I can to the " application that you have made to me for a review of the " decision of the late Bishop of Bath and Wells not to accept " you for institution to the benefice of Batcombe. As " I pointed out to you when you were kind enough to come " and see me, I am advised that what is required of me by " the Measure is to consider whether a case has been made out " for varying the decision reached in the diocese. It is not " my duty to hear the whole case afresh or to consider it on " its merits as though no decision had already been reached. " I must assume that the late bishop exercised the utmost " care himself and reached his decision only after very full

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(1) By Benefices (Exercise of Rights of Presentation) Measure, 1931, s. 1: "A vacancy or impending vacancy in a benefice shall be notified by the bishop to the patron and the parochial church council."

By s. 2, sub-s. 1: "When a vacancy or impending vacancy has been notified to a parochial church council under this Measure, such parochial church council may make representations in writing to the patron as to the conditions, needs and traditions of the parish, but without indicating the name of any particular clerk."

By s. 3, sub-s. 1: "A patron shall be entitled to exercise his right of presenting . . . . to a vacant benefice in the same manner as if this Measure had not been passed, unless the parochial church council within 30 days after the vacancy or impending vacancy has been notified under this Measure shall pass a resolution (which shall forthwith be notified by the council to the bishop and the patron) that the provisions hereafter in this section contained shall have effect." Sub-s. 2: "If in respect of any vacancy such a resolution shall be passed within the period aforesaid, the following provisions shall have effect (that i to say) :—(i.) the patron shall entitled to exercise his right of presentation after conferring . . . . with and obtaining the consent of the churchwardens . . . . ; (ii.) In any case where a period of 60 days has elapsed after the vacancy or impending vacancy has been notified under this Measure and (*a*) after a conference with the churchwardens under this section, the churchwardens have not given their consent, or (*b*) such conference has for any reason other than the neglect or refusal of the patron not taken place, the patron shall be entitled to exercise his right of presentation after obtaining the bishop's approval of the clerk presented as being suitable for the duties attaching to the cure of souls in the particular benefice concerned: Provided that—(*a*) the bishop before giving or withholding his approval may, and shall, if the patron or parochial church council so requires, consult the body of advisers established by this Measure; (*b*) If the bishop finally withholds his approval, the patron may bring his decision before the archbishop for review, and may lawfully present the clerk concerned if the archbishop shall authorize such presentation."

"and careful consideration. Indeed, the volume of correspondence which has passed on this subject is evidence of "this. I have then to consider whether sufficient argument "has been adduced to lead to the reversal of a decision so "reached, and I feel obliged to let you know that, in my "judgment, no such sufficient argument has been put before "me. The decision reached by the late bishop must, therefore, "be regarded as standing."

In those circumstances the applicant moved the Divisional Court for an order of certiorari to bring before the court the review of the late bishop's decision and to quash the archbishop's decision, and for an order of mandamus directing the archbishop to hear and determine all issues of fact and law necessary to enable him to decide whether the decision of the late bishop was a just and proper decision, and to hear and determine these issues according to law, to receive all relevant evidence tendered by the applicant, and to permit him to appear by counsel. Among other evidence was an affidavit by the archbishop dated October 1, 1943, in which he said that, in his view, he was, in reviewing the bishop's decision, not hearing an appeal from a judicial sentence, but was, in an administrative capacity, reviewing an administrative decision of the bishop in the light of the evidence on which the bishop acted and any other evidence presented to him (the archbishop). He further said that the documents before him were not disclosed to the applicant, and that they contained several letters marked "confidential" and others which, though not so marked, were of a confidential character. He also said that, in suggesting a further meeting after that of June 14, 1943, his reason was that one letter which weighed most with him was marked "confidential." He felt he would like to put it before Mr. Vaisey but could not do so without the writer's consent. On June 23, 1943, the writer of the letter and Mr. Vaisey were present and at his request the writer read the letter aloud and confirmed it orally. Mr. Vaisey asked the writer some questions and then addressed him. This meeting was confidential. The Divisional Court (Viscount Caldecote C.J., Charles and Hallett JJ.) dismissed the application, holding (1.) that the word "review" in the Measure did not have the same meaning and effect as "appeal"; (2.) that the archbishop was not under a duty to follow the procedure of a judicial inquiry as if there was a lis inter partes; and (3.) that the review was not a quasi-judicial inquiry at

REX v. ARCHBISHOP OF CANTERBURY. *Ex parte* MORANT.

which the archbishop (and before him the bishop) was bound to act in a judicial manner. The applicant appealed.

Casswell K.C. and *L. MacLaren* for the applicant. Under the Benefices Act, 1898, the applicant, as patron, had a right to take to the law courts any dispute regarding the exercise of his right of presentation. The Benefices (Exercise of Rights of Presentation) Measure, 1931, s. 3, altered the position by enabling a parochial church council to require the matter to be referred to the bishop of the diocese and to require the bishop to consult the body of advisers. If the bishop refuses, his approval, as happened here, the patron can, under s. 3 sub-s. 2 (ii.), proviso (*b*), appeal to the archbishop "for "a review of the bishop's decision." The archbishop, in reviewing the bishop's decision, was dealing with a right of property, and, in dealing with such a right, he must act judicially and give both sides an opportunity of being heard, the other side being the parochial church council. In the court below it was assumed that for the applicant to be right there must be a lis inter partes. That is not so. The archbishop's review is of a quasi-judicial nature, and the applicant had a right to know what documents were before the archbishop apart from the report of the body of advisers. The word "review" is often used to mean an appeal. In *Allcroft* v. *Bishop of London* (1) a complaint was made of an improper addition to St. Paul's Cathedral. The bishop refused to alter the matter and an application to the court for a mandamus was refused, but there no legal right was involved. [LORD GREENE M.R. The meaning of the word "review" is a matter of construction on the particular statute.] In such a case as this the court will see that substantial justice is done: see *Rex* v. *Electricity Commissioners* (2). Under the Act of 1898 the parties could lay the question in issue before the court. That direct right has been taken away, but there is still a dispute between parties whether a particular presentation is to be made. Even if there be no lis inter partes the person deciding the right of any person must act in a quasi-judicial manner, and when there has been a failure to do so a case for certiorari and mandamus arises: *Rex* v. *Woodhouse* (3); *Local Government Board* v. *Arlidge* (4); *Errington* v. *Minister*

(1) [1891] A. C. 666.
(2) [1924] 1 K. B. 171.
(3) [1906] 2 K. B. 501.
(4) [1915] A. C. 120, 132.

of Health (1). Here the archbishop acted on a confidential letter which was never communicated to the applicant. That is not the sort of proceeding by which a legal right should be taken away. In the Divisional Court the judgment of Lord Ellenborough in *Rex* v. *Archbishop of Canterbury and Bishop of London* (2) was relied on as conclusive against the applicant, but that case was very different from the present one. It concerned the approval of a man as a lecturer, and no question of taking away the right of a subject arose]. [They also referred to *General Medical Council* v. *Spackman* (3).]

Denning K.C. and *Wigglesworth* for the archbishop were not called on to argue.

Lord Greene M.R. In my opinion, the decision of the Divisional Court was manifestly right. The substantial question submitted to us relates to the nature of the functions of the archbishop under s. 3, sub-s. 2 (ii.), proviso (*b*), of the Benefices (Exercise of Rights of Presentation) Measure, 1931. Under that proviso the archbishop is given power to review the decision of the bishop where the bishop has withheld his approval of the clerk presented by the patron to a benefice.

Originally the right of the patron to present was subject only to very limited restrictions. By the Benefices Act, 1898, power was given to the bishop to refuse to institute or admit a presentee to a benefice in certain carefully defined circumstances. That power did not in terms interfere with the power of the patron, but it did so indirectly by enabling the bishop to refuse to admit the presentee. Section 3 of that Act gave a special right of appeal against the refusal of the bishop to institute or admit the presentee, and that right was given both to the patron and to the presentee. A special court was constituted for the purpose and directions were contained in the section as to the procedure which was to be followed.

Up to that point in the history of advowsons the wishes of the parish had no place, but in 1931 there was an entirely new departure. It is obvious from the language of the Measure, and, indeed, it is a matter of common knowledge, that some dissatisfaction existed by reason of the fact that a clerk might be presented to a benefice who, although in every way suitable for the performance of spiritual duties and not affected by

(1) [1935] 1 K. B. 249.
(2) (1812) 15 East 117.
(3) [1943] A. C. 627.

any of the special grounds of disqualification mentioned in the Act of 1898, might not be the right man for the particular parish. Parishes often have strong views as to what their needs and traditions require in the matter of a pastor, and the Measure of 1931 contained a provision of a novel character giving the parochial church council the right to make its voice heard. The Measure is entitled " A Measure to regulate " the Exercise of Rights of Presentation to Benefices." It is therefore one which, on the face of it, proposes to interfere with the right of the patron at common law to exercise the rights inherent in the property he owns, namely, the advowson. The machinery provided by the Measure is as follows. Under s. 1 vacancies are to be notified by the bishop to the patron and to the parochial church council. Under s. 2, when such a notification is made, the council is entitled to make written representations to the patron as to the conditions, needs and traditions of the parish, but in those representations they are not to mention the name of any particular clerk. The next matter of machinery to be provided is contained in s. 3, and it is with regard to the operation of that machinery that the present question arises. Section 3, sub-s. 1, confers on the parochial church council the power to pass a resolution the effect of which is to suspend the right of the patron to present a clerk to a vacant benefice. The right, however, can become exercisable if either of two things happen. The first, as set out in para. 1 of sub-s. 2, is the obtaining of the consent of the churchwardens acting as the representatives of the parochial church council after a conference of the nature indicated. The sub-section then goes on to make provision for the case where the consent has not been obtained. It was obviously not thought desirable that the parochial church council should have the final right of veto, and, accordingly, provision is made for what is to happen if a deadlock occurs between the patron and the council. In that event " The " patron shall be entitled to exercise his right of presentation " after obtaining the bishop's approval of the clerk presented " as being suitable for the duties attached to the cure of souls " in the particular benefice concerned." Thus, the bishop is given the right to override the refusal of the churchwardens to consent to the exercise of the right of presentation. In considering whether or not he will give his approval, the particular matter to which he must direct his mind is the suitability of the presentee for the duties attaching to the cure of souls in the particular benefice. The legislature clearly realized that the responsibility placed on the bishop in those circumstances was a serious one in respect of which it would be very convenient for him to have outside advice. It must also have been realized that, from the point of view of the parish and, possibly, other persons, it would not be desirable to have it said that the bishop was put in an autocratic position. Accordingly, the legislature provided that a body of advisers should be set up in every diocese. I need not refer to its constitution, but it is an eminently suitable body for tendering advice to the bishop in the discharge of a very delicate duty, and, accordingly, the sub-section goes on to provide that the bishop, before giving or withholding his approval, may and shall, if the patron or parochial church council so require, consult the body of advisers established by this Measure. That, then, is the machinery down to the stage when the matter is in the hands of the bishop. The legislature was not content to stop even there, because it provides a further right of recourse to the archbishop if the bishop finally withholds his approval: see s. 3, sub-s. 2 (ii.), proviso (*b*), of the Measure. It is the nature of the archbishop's function under that proviso which is in controversy in this appeal.

The substantial matter of complaint against the archbishop's action in the present case is that he did not regard himself, as it was said he ought to have done, as a person exercising a quasi-judicial function, and, to take the most important matter of complaint that was put before us, did not communicate to the applicant the material supposed to be derogatory to him so that he might have an opportunity of dealing with it. There was a confidential letter which had been before the bishop and the body of advisers. When the matter was before the archbishop that letter was read, in confidence, to Mr. Vaisey, who was acting as the friend, and not technically as the counsel, of the applicant in his application to the archbishop. The letter was never shown to the applicant and, as it was only shown confidentially to Mr. Vaisey, he could not communicate its contents to the applicant. If this had been a matter in which the archbishop was exercising quasi-judicial functions and had, therefore, to act in accordance with the rules of what is commonly called natural justice, his action would have been open to the comment—I think, successful comment—that a tribunal exercising such functions

C. A.

1944

REX
v.
ARCHBISHOP OF CANTERBURY.
Ex parte MORANT.

Lord Greene M.R.

cannot perform its duty unless it gives the person concerned a real and effective opportunity of meeting any relevant allegations made against him. The case was presented before us in two aspects. First, it was said that the archbishop's function was in the nature of or analogous to the function of a person conducting a lis inter partes in the sense that the question which he had to decide was between the parochial church council, as the body opposing the presentation, and the patron who desired to present the clerk. I am not sure how far Mr. Casswell desired to press that argument, but he did lay particular emphasis on the word " review " as indicating that the archbishop was in some sense a person having an appellate jurisdiction. In my opinion, the analogy of a lis inter partes, however vaguely it is sought to apply it to the present case, is completely erroneous. There is no suggestion in the Measure that the archbishop is concerned with anything of the kind. All that the proviso does is to give the patron the right to ask the archbishop to review the decision of the bishop. There are no provisions for notifying the parochial church council. There is no direction to the archbishop or to the patron to cause the council to attend the review, and it is to be observed that the matter with which the bishop, in the first instance, and, later, the archbishop, is concerned may have no real relation to any objection that the council has put forward. I can find no shadow of a justification for regarding the matter when it comes before the archbishop as in any sense a lis inter partes. In point of fact, in examining the functions of the archbishop, the first step, in my opinion, is to ascertain exactly what was the action of the bishop which he is to review. It seems impossible to suggest that the whole nature of the inquiry is changed when it passes from the bishop to the archbishop. I cannot imagine any language less suitable than that used in the case of the bishop unless, indeed, it be that used in the case of the archbishop, to describe something in the nature of a contest at which parties are to be heard in opposition to one another. The only function of the bishop is to give or to refuse his approval of the clerk presented as being suitable for the purposes indicated. Mr. Casswell felt himself constrained by force of logic to argue that the position before the bishop was precisely the same as it was before the archbishop, and that it was in the nature of a contest. In my opinion, that is completely wrong. The approval of the bishop is merely one of the two methods laid down for getting rid of the statutory suspension of the patron's right of presentation contained in sub-s. 1, and it is a pendant to the other method of getting rid of that statutory suspension, namely, the consent of the churchwardens. So far as the argument rests on this suggestion of a lis or contest it falls to the ground.

The second way in which the case was presented did not depend on the existence of a contest or lis. It was said : Here is a piece of legislation with statutory force which may deprive the owner of property, to wit, the patron, of some of his rights, in respect of that property, and wherever a person or body of persons is given power to deprive a person of, or to affect, his rights, there is a statutory obligation to act in a quasi-judicial manner with all the consequences which that implies. In support of that proposition a number of well-known authorities were cited relating to such matters as closing orders, clearance orders, and things of that kind, with the principles of which we are all very familiar, but, in my opinion, none of those authorities is of any assistance in this case. The question we have to decide is not some general or abstract question of principle, but the construction of a particular piece of legislation dealing with a very special subject-matter. The right of presentation to an ecclesiastical benefice is one which obviously on the face of this Measure is not to be regarded merely as a piece of private property. It is a right the exercise of which is to be subject to curtailment in the interests of the persons whose spiritual welfare will depend on the proper exercise of the right. That is the policy of this Measure, and the language used in relation to the restriction of the patron's right is quite different in tone and emphasis from the language used in cases where a man is having his house made subject to a demolition order, or something of that kind. The method which I always adopt in considering the language of an Act of Parliament is, first, to try to construe the language of the Act in relation to the subject-matter with which it is dealing, and, having done that, to see to what extent, if any (and very often it is to no extent at all), decisions on other Acts of Parliament, differently worded and relating to different subject-matter, may be of assistance in that they may contain some statement of principle which is applicable. In the present case I find quite sufficient on the face of this Measure to enable me to place what I conceive to be the true construction on it without obtaining any assistance from the authorities quoted to us. As I have said, to find out what the function of the archbishop is, it is necessary to look at the function of the bishop. The two functions, in my opinion, are precisely the same. What the archbishop is to give, if he thinks fit, is his approval. It is true that the language used in the case of the archbishop is "to authorize the presentation," whereas that in the case of the bishop is "approval of the clerk," but that difference in language does not indicate any difference in the substantial functions which they are performing. The difference, of course, is that, when the matter comes to the archbishop, he has before him the decision of the bishop, and in considering whether or not he will authorize the presentation, he must give due weight to the fact that the bishop, with or without the help of the body of advisers, has formed a view on the matter, but I cannot find that what the archbishop does on a review is anything more than what the bishop himself might have done, namely, consider whether he will approve the clerk presented as being suitable for the duties. It is to give a wrong emphasis to the whole structure and language of this section to regard the function of the bishop and, after him, the archbishop as being that of depriving a person of his right of property or limiting his right to exercise it. It is the legislation itself which says that when once the resolution is passed by the council (which merely means that the council is indicating a desire to take a hand in the matter and to be consulted), the right of presentation is suspended, and the function of the bishop, like the function of the churchwardens acting as representatives of the council, is to decide whether to remove that suspension and enable the right to be exercised. That is one matter which differentiates this case from many of those to which we were referred, and a close examination of the language seems to me to show the intention of the legislature to place the action of the bishop entirely outside that category of cases.

It is of vital importance to keep in mind the nature of the subject-matter with which the Measure deals and the power given to the bishop to give or withhold approval of an individual which in many cases may require the very nicest tact and the utmost discretion and involve the consideration of matters the publication of which would be of no use to anybody and might do an infinity of harm by perhaps wrecking the peace of a parish for a generation. The task of the bishop is to give one of the most delicate decisions to be made by a person in authority. It is a task affecting three parties: the patron, perhaps the least important of the three; the clerk, who may find criticism made against him in his after life because the bishop has refused to approve his presentation to a parish; and the parish, which runs the risk of having put on it a clerk who proves unsuitable. The same risks arise also according to the archbishop's decision on a review of the bishop's decision. It is easy to imagine a case where the council's objection to a particular man is based on some misinformation or unreasoning prejudice which is impossible to remove, although the man himself is suited to perform not merely spiritual duties in general but the spiritual duties of the particular parish. If the bishop decides to approve this presentation the presentee may find himself opposed by that mass of prejudice. The legislature, no doubt realizing the difficulty of the bishop's task, has relieved him of part of the responsibility of the decision by providing him with a body of advisers to whom he may refer or be required to refer a matter on which he feels unable to come to a decision or that he ought not to come to a decision without receiving advice. The fact that that body of advisers is established appears to me to be the strongest possible indication that the function of the bishop has to be exercised on special lines of its own with the assistance of the body of advisers. The bishop, availing himself of such sources of information as he, as an honest and conscientious leader of the church, may think proper, and dealing with that information in such way as he thinks suitable, has to perform an act which is essentially one of conscience and judgment. To impose on him the obligation to disclose to the patron the material which comes to his hand would make it impossible for him satisfactorily to perform his delicate duties. There is no more right to his act of approval than there is in many cases where approval of some one is needed to give an act validity. It must not be taken that I am allowing myself to be influenced by an insufficient analogy when I refer to the very common case where directors are given a power to approve a transfer of shares. I take it merely as an illustration. Directors can give or withhold their approval without being questioned, and they are not bound to give their reasons. They have merely to decide on such material as they think suitable, and nobody can complain of their action. It is hard to find a more striking example of a power to interfere with property rights than the

C. A.

1944

Rex
v.
Archbishop of Canterbury.
Ex parte Morant.

Lord Greene M.R.

right of directors to prevent a shareholder from disposing of part of his shares. However, I only mention that in passing to give an illustration of the kind of idea which I have in mind as to the meaning to be given to the word "approval." I cannot imagine any function more personal, more intimate and more delicate than the bishop's approval of a clerk, and to endeavour to limit the power of the bishop by the sort of rules which are applicable where a local authority is minded to establish a clearance area seems to me impossible. It involves comparing two things which are as unlike as they can possibly be. It is, in my opinion, impossible to say that, when the matter comes before the archbishop, the nature of the act to be performed by him becomes totally different from that performed by the bishop. Why should the archbishop have to treat the matter on different lines, by different procedure, and according to different principles? In my opinion, the claim of the applicant in the present case is misconceived, and the appeal must be dismissed.

MacKinnon L.J. I agree. The hopelessness of this appeal is shown by the fact that Mr. Casswell sought to rely on such a case as *General Medical Council* v. *Spackman* (1). That case concerned a statute which provides that the General Medical Council may erase the name of a practitioner from the register "if he shall, after due inquiry, be judged by the "council to have been guilty of infamous conduct." Such a duty obviously imports the obligation of quasi-judicial investigation with all that is thereby implied. In the Measure with which we are concerned there is nothing remotely resembling that provision. It merely provides for the bishop's expressing his approval or disapproval of a presented clerk and, if he disapproves, for the patron being able to bring his decision before the archbishop for review. The function exercised by the bishop and, in his turn, by the archbishop, under those directions cannot possibly involve the carrying out of a quasi-judicial inquiry like that in *Spackman's* case (1). Indeed, if I had not heard Mr. Casswell argue the case with so much plausibility, I should have thought this appeal was unarguable. I agree that it should be dismissed.

du Parcq L.J. I also agree, and for the same reasons.

Appeal dismissed.

Solicitors: *Evill & Coleman; Lee, Bolton & Lee.*

H. C. G.

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(1) [1943] A. C. 627.

REX *v.* CROFT.

C. C. A.

1944
Jan. 20, 21.

Criminal law—Murder—Accessory before the fact—" Suicide pact "—Survivor not present at suicide of other party—Countermanding of agreement.

Where two persons enter into an agreement to commit suicide and one of them carries out the agreement, the survivor, even though he was not present when the crime was committed, is nevertheless an accessory before the fact and is guilty of murder, unless he proves that the agreement had been expressly determined.

APPEAL against conviction.

The appellant, William James Croft, was charged at the Winchester assizes, before Humphreys J. and a jury, with the murder by shooting of Joan Norah Lewis. The appellant and Lewis had formed a passionate attachment and the evidence showed that on the night of October 15, 1943, they went to a summer house in some grounds and mutually agreed to commit suicide. The appellant had with him a loaded revolver, which he had cocked and which was placed in front of them as they sat together. According to the evidence given by the appellant at the trial, the woman picked up the revolver and discharged it, wounding herself in the left breast. She was in great pain and asked the appellant to go for help, whereupon he climbed out of a window of the summer house (the door being locked) intending to summon assistance, but before he had gone more than a few paces the revolver was discharged a second time, the woman having either intentionally fired a bullet through her brain or accidentally discharged the weapon with a like result. The jury returned a verdict of Guilty, and Humphreys J. passed sentence of death. The appellant appealed against his conviction on the ground of misdirection of the jury by the learned judge.

Humfrey Edmunds for the appellant. The learned judge was wrong in directing the jury that, if the alleged suicide was the result of an agreement between the parties, the appellant was guilty of murder, and in failing to call their attention to the fact that the appellant was not present when the second and fatal shot was fired. A survivor of two parties to a " suicide " pact " who is not present when the crime is committed cannot be held to be an accessory before the fact. There are a number of cases in which it is said that the survivor, even if not present at the commission of the crime, is an accessory before the fact, but in all those cases the survivor was present, and, therefore, the observations were merely obiter dicta. The jury here were entitled to consider whether the death of the woman was caused by accident or whether her intention to commit suicide was formed after the first shot was fired and while the appellant was seeking help, but those considerations were not referred to by the learned judge in his summing-up. The fact that the woman asked the appellant to go for help and that he set out to do so is evidence showing that any agreement to commit suicide had been abandoned. The possibility of manslaughter also should have been, and was not, put to the jury. [He referred to *Rex* v. *Dyson* (1) ; *Reg*. v. *Alison* (2) ; *Reg*. v. *Jessop* (3) ; *Reg*. v. *Stormonth* (4) ; *Rex* v. *Abbott* (5) ; and *Rex* v. *Symonds* (6).]

Maude K.C. and *Scott Henderson* for the Crown. It is not surprising that no case is to be found in the reports where the survivor of parties to a " suicide pact " has not been present at the suicide. Until the middle of last century a person guilty of procuring and helping another to commit a crime could not be tried unless the principal felon had been brought to justice, and that could not be done where the principal felon had committed suicide. The law is quite clear. " If one man persuades another to kill himself, the adviser is " guilty of murder " : Russell on Crime, 9th ed., Vol. I, p. 344 ; to which passage in the text there is the following footnote : " If present when the other kills himself. If absent, " he is accessory before the fact : *R*. v. *Russell*, 1 Mood. 356." If the " pact " had not been actually countermanded before the commission of the crime the survivor would be an accessory before the fact : Russell on Crime, 9th ed. Vol. II, p. 1491 ; and there is nothing in the evidence to show that the appellant did anything to put an end to the agreement.

LAWRENCE J., delivering the judgment of the court (Lawrence, Lewis and Wrottesley JJ.), stated the facts, referred to minor grounds of appeal, and continued : It has been contended that where two persons enter into an agreement to commit suicide and one of them does commit suicide, the survivor, if he be not present when the crime is committed, does not become an accessory to the crime of murder, because the mere agreement is not such a counselling, advising, procuring or abetting as would make him an accessory before the fact. A number of cases have been referred to: *Rex* v. *Dyson* (1); *Reg.* v. *Alison* (2); *Reg.* v. *Jessop* (3); *Reg.* v. *Stormonth* (4); *Rex* v. *Abbott* (5); and, lastly. *Rex* v. *Symonds* (6). It is true that in each of those cases the accused person was present, and was charged with aiding and abetting. The distinction between those who aid and abet and accessories before the fact is, of course, that those who aid and abet are present when the felony is committed whilst accessories before the fact are absent. As Mr. Maude has pointed out to us, it was impossible before 1861 for a person in the position of the appellant to be charged as an accessory before the fact because, before that date, it was necessary that the principal felon should first have been convicted, and, as the principal felon had died, he could not be convicted. Therefore, all the cases mentioned were not of accessories before the fact, but of aiders and abettors. In *Rex* v. *Symonds* (6), it was only an obiter dictum, because there the accused person had been present at the commission of the offence—but Lord Hewart C.J., sitting with Darling and Salter JJ., and dealing with a case of suicide, said that, even in a case in which the survivor is not present when the agreement is acted on, he is none the less an accessory to the crime.

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(1) (1823) Russ. & Ryan 523, 525.
(2) (1838) 8 C. & P. 418.
(3) (1877) 16 Cox, C. C. 204.
(4) (1897) 61 J. P. 729.
(5) (1903) 67 J. P. 151.
(6) Unrep. see The Times, Dec. 19, 1922.

This court is of opinion that a mutual agreement to commit suicide amounts to such a counselling, procuring, inducing, advising or abetting as constitutes the survivor an accessory before the fact even if he is not present when the other party to the agreement commits suicide. The words of description of an accessory before the fact are very wide, as is shown by Russell on Crime, 9th ed., Vol. II, p. 1481, et seq., where are cited two authorities, Hawkin's Pleas of the Crown and Hale's Pleas of the Crown.

Counsel for the appellant also complains that the summing-up does not contain any reference to the possibility of the agreement to commit suicide having been determined. It is true that the learned judge does not deal expressly with that

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(1) Russ. & Ryan 523, 525.
(2) 8 C. & P. 418.
(3) 16 Cox, C. C. 204.
(4) 61 J. P. 729.
(5) 69 J. P. 151.
(6) Unrep., see The Times, Dec. 19, 1922.

C. C. A.
1944
Rex v. Croft.

matter except in a passage where he says: "Even if you "accept his statement in the witness-box that the vital and "second shot was fired when he had gone through that window, "he would still be guilty of murder if she was then committing suicide as the result of an agreement which they "had mutually arrived at that that should be the fate of both "of them, and it is no answer for him that he altered his "mind after she was dead and did not commit suicide "himself." The authorities, however, such as they are, show, in our opinion, that the appellant, to escape being held guilty as an accessory before the fact must establish that he expressly countermanded or revoked the advising, counselling, procuring, or abetting which he had previously given. We are of opinion that the circumstances in this case did not amount, and could not reasonably have been held to amount, to such a clear countermanding or determination of the agreement as would discharge the appellant from liability to a charge of murder if that which occurred was the result of what he had done before. He never said anything to the woman which could have removed from her mind the effect of the counsel which he had previously given her.

For these reasons this appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for the Crown: *Director of Public Prosecutions.*

A. W. G.

C. A.
1944
Jan. 24, 25.

MINISTER OF HEALTH *v.* BELLOTTI AND ANOTHER.

Licence—Licence to occupy rooms—Notice to determine licence—Reasonable time to leave premises—Crown—Minister of Health—Statutory power to sue and be sued—Action for trespass—Ministry of Health Act, 1919 (9 *&* 10 *Geo.* 5, *c.* 21), *s.* 7.

To house the defendants and other persons evacuated from Gibraltar in 1940 for reasons connected with the war, large blocks of flats were requisitioned and furnished by the Commissioner of works and then handed over to the Minister of Health who granted licences to evacuees to reside in them. Difficulties as to discipline having arisen, letters dated June 8, 1943, were sent on behalf of the minister to the defendants requiring them to leave their rooms together with their dependants, taking all their possessions with them, within one week. Attempts to expel them having failed, the minister commenced proceedings on September 11, 1943, for damages for trespass and an injunction:—

Held, (1.) that the minister was entitled to bring such an action by virtue of s. 7 of the Ministry of Health Act, 1919, although he held the flats for the Crown; (2.) that, in the special circumstances, that the defendants had been brought away from their homes and friends and needed time to find rooms for themselves, their families and belongings, a week was not a reasonable time to allow them for leaving their rooms; and (3.) that, although the time allowed was unreasonable the letters were valid notices revoking the licences, and as, by the time these proceedings were commenced, sufficient time had elapsed for the defendants to vacate their rooms, the minister was entitled to injunctions restraining the defendants from trespassing in the blocks of flats.

The view expressed by the Privy Council in *Canadian Pacific Railway Co.* v. *The King* [1931] A.C. 414 that the licence in that case could only be revoked by a notice which specified a sufficient time to enable the licensee to do what the revocations of the licence made necessary, laid down no such general rule.

APPEALS from the West London county court.

In August, 1940, some 12,000 persons were evacuated from Gibraltar for reasons connected with the war and brought to this country. These persons included the two defendants and their families. For the purposes of housing these evacuees the Commissioner of Works requisitioned, under reg. 51 of the Defence (General) Regulations, four blocks of flats known as Marlborough Court, Pembroke Road, Earls Court, London, and other premises, and, after furnishing them, handed them over to the Minister of Health. The minister allotted rooms to the evacuees as they arrived, including the two defendants and their families, who occupied the rooms as licensees. Subsequently, a scheme was come to by which evacuees obtaining employment at more than a certain salary had to contribute towards their maintenance. The two defendants were among that number. Difficulties having arisen on matters of discipline, an official of the Minister of Health sent letters, both dated June 8, 1943, to the two defendants in the following terms: " I am directed by the " Minister of Health to give you notice that you are required " to leave the Gibraltar evacuee centre at Marlborough Court " . . . ., together with your dependants, taking all your " possessions with you by noon one week after the delivery of " this letter. Otherwise you will be expelled." The two

C. A.
1944

MINISTER OF HEALTH v. BELLOTTI.

defendants having failed to comply with these notices, attempts were made, first, to expel them by force, and, when that did not succeed, to cause them to leave by depriving them of food tickets. Finally, when the defendants stayed on in spite of this, the Minister of Health commenced proceedings in the county court against both defendants claiming damages for trespass and injunctions to prevent their coming on the premises or occupying any room on the premises. The county court judge held, dealing, first, with technical points taken for the defendants (1.) that Marlborough Court was properly requisitioned and handed over to the control of the Minister of Health; and (2.) that the minister had a right to bring these proceedings under s. 7 of the Ministry of Health Act, 1919. He also held that, while the defendants were in occupation of their rooms as licensees, they were entitled to reasonable notice sufficient to enable them, not only to remove their families and goods into the street or into storage, but also to make provisions for the housing of their families and the disposal of their property; that reasonable notice had not been given, and, therefore, that the action failed. The minister appealed.

Sir Donald Somervell A.-G., *Valentine Holmes* and *H. L. Parker* for the Minister of Health. The notice given by the minister was good. The county court judge misdirected himself in regard to the question of alternative accommodation. There is no authority for imposing restrictions in the case of furnished premises similar to those imposed by the Rent Restrictions Acts in the case of unfurnished premises. The length of the notice may appear to be short, but a considerable time elapsed before proceedings were instituted, and during that period the defendants had ample opportunity to find other accommodation. The rights of the defendants were not in any way infringed. There is nothing in the authorities to show that the minister acted wrongfully. Certain passages in the judgment in *Canadian Pacific Railway Co.* v. *The King* (1) may be difficult to explain, but the facts in that case were of a special nature, and the decision does not affect the present case. The general trend of the authorities is in favour of the minister: see *Cornish* v. *Stubbs* (2); *Mellor* v. *Watkins* (3); *Kerrison* v. *Smith* (4); *Hurst* v. *Picture Theatres, Ld.* (5).

(1) [1931] A. C. 414.
(2) (1870) L. R. 5 C. P. 334.
(3) (1874) L. R. 9 Q. B. 400.
(4) [1897] 2 Q. B. 445.
(5) [1915] 1 K. B. 1.

Beyfus K.C. and *Salkeld Green* for the defendants. The period given by the notice was inadequate, and matters are not affected by the fact that some time elapsed before proceedings were brought. The contrary view might lead to great inconvenience and uncertainty, as licensees would not know their true position, in the event of a short notice being given. There are some very unusual factors in the present case, and they should be borne in mind. *Canadian Pacific Railway Co.* v. *The King* (1) is strongly in favour of the defendants, and *Mellor* v. *Watkins* (2) is more favourable to the defendants than to the minister. In any event, the Crown should have been the plaintiff in the action, and not the Minister of Health. Section 7 of the Ministry of Health Act, 1919 (3) does not entitle the Minister of Health to bring proceedings in such a case, and admittedly there is nothing else to entitle him to do so. He had not sufficient ownership of Marlborough Court to entitle him to sue, seeing that he held the property on behalf of the Crown. *Minister of Supply* v. *British Thomson-Houston Co.* (4) does not deal with a modern Act, but with the War Department Stores Act, 1867. The language of s. 20 of that Act and the Admiralty Suits Act, 1868, s. 3, should be contrasted with the Ministry of Health Act, 1919, s. 7 : see also Ministry of Transport Act, 1919, s. 26. The Court should give a different interpretation to Acts so different in wording. Section 7 of the Act of 1919 only deals with an action brought by or against the minister personally. In the present case the minister acquired no rights in the

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(1) [1931] A. C. 414.

(2) L. R. 9 Q. B. 400, 405.

(3) Ministry of Health Act, 1919, s. 7: "(1.) The Minister "may sue and be sued by the "name of the Minister of Health, "and may for all purposes be "described by that name.

"(3.) For the purpose of "acquiring and holding land, the "Minister of Health for the time "being shall be a corporation "sole by the name of the "Minister of Health, and all land "vested in the Minister shall be "held in trust for His Majesty for "the purposes of the Ministry of "Health.

"(4.) Upon and by virtue of "the appointment of any person "to be Minister, the benefit of all "deeds, contracts, bonds, securities, or things in action vested "in his predecessor at the time "of his predecessor ceasing to "hold office shall be transferred "to and vested in and enure for "the benefit of the person so "appointed, in the same manner "as if he had been contracted "with . . . . and if his name had "been inserted in all such deeds, "contracts, bonds and securities "instead of the name of the "predecessor."

(4) [1943] K. B. 478.

C. A.

1944

MINISTER OF HEALTH *v.* BELLOTTI.

requisitioned property. It was requisitioned on behalf of the Crown by the Commissioner of Works who permitted the minister to have it for the benefit of the evacuees. The right to bring an action for trespass was in the Crown. All the minister did was to manage the property and that could not give him the right to sue.

Sir Donald Somervell A.-G. replied.

LORD GREENE M.R. The controversy out of which this litigation arises is a sorry business. It is agreed on both sides that the defendants were in the position of licensees and, further, that they were not gratuitous licensees, but that, by the payment or contribution which they made under the scheme that was set up by the Ministry, they are entitled to be regarded as licensees paying a consideration in money for the licence which they enjoyed.

I must deal, in the first instance, with what is really a preliminary point. The action is brought by the Minister of Health by that description. It is said that the action ought to have been brought on behalf of the Crown and that the Minister of Health has no title to maintain it. It is argued by Mr. Beyfus that, the possession of the Ministry of Health being possession on behalf of His Majesty, nobody but His Majesty is competent to institute proceedings such as those instituted here which are in form a claim against each defendant for damages for trespass and an injunction to restrain him from occupying his rooms. In my opinion, that argument cannot prevail, by reason of s. 7, sub-s. 1, of the Ministry of Health Act, 1919. Apart from those provisions, I do not suppose it would be disputed that the argument would be right, but under that sub-section it is provided that " the minister may sue and be sued by the name " of the Minister of Health and may for all purposes be " described by that name." Mr. Beyfus would have us construe the general language of that sub-section as limited in effect to two classes of cases, the first being the case where the minister could have been sued personally in respect of contracts or torts, under which he incurred a personal liability, and the second being when proceedings are brought admittedly by the minister in his capacity as a servant of the Crown, but only if they are brought under contracts or proceedings in respect of land acquired and held in trust for

C. A.

1944

MINISTER OF HEALTH *v.* BELLOTTI.

Lord Greene M.R.

His Majesty under sub-s. 3. In my opinion, it is not possible to place such a limited construction on the words of sub-s. 1. That sub-section, in my opinion, enables the minister, who, as a servant of the Crown, has the necessary relationship to the subject-matter of the action, to do what otherwise he would not be able to do, namely, to enforce the rights of the Crown as though they were his own and as though he were not merely a servant of the Crown. Of course, the minister, to be able to do that, must have the necessary relationship to the subject-matter of the action. If he has made a contract as minister on behalf of the Crown, he can sue on that contract, and the Crown is not a necessary party. So, too, he may, as minister of the Crown, be in possession of chattels or land on behalf of the Crown, and if in this connexion a cause of action arises which strictly would be a cause of action in the Crown, he, by virtue of his possession on behalf of the Crown, is entitled as minister to sue by that name in the action. Any other construction would cut down in an unjustifiable way language which is quite general and which must be directed to the actions and the rights of the minister as a servant of the Crown. I see no ground for limiting the scope of the subsection to any particular class of action or right. In the present case, under the very language of the Act of 1939, the possession was taken by the minister on behalf of the Crown, and the minister, being in possession on behalf of the Crown, is entitled, as minister and by that name, to enforce the rights of the Crown as the party in possession. That conclusion is supported by the reasoning of this court in *Minister of Supply* v. *British Thomson-Houston Co.* (1), and, in particular, by the language of MacKinnon L.J. (2), and of Goddard L.J. (3). So much for the preliminary point.

With regard to the substantial point in the case, the question raised is one of some interest. As I have already said, the defendants were licensees for valuable consideration in respect of the premises which they occupied, and the licence extended to allow them to live in their flats, to have additional furniture of their own, and to have their wives and families there. It is important to remember the circumstances in which that licence came to be granted. This is not a case of a licence granted on commercial lines, nor is it a licence granted out of mere friendship or kindness. It was a licence granted by

(1) [1943] K. B. 478.
(2) Ibid. 481, 482.
(3) Ibid. 488, 489.

a department of State under a very high duty to persons who, through the exigencies of the war and no fault of their own, had, by governmental action, been removed from their homes and transported to this country. No decent minded person could possibly suggest, and, indeed, it is unthinkable, that in those circumstances the government should act otherwise than under a very strong sense of responsibility for the care and welfare of these individuals. The grant of this licence, or something like it, was incumbent on the minister as the person entrusted with the duties of government in that behalf. I refer to that because it appears to me that where a question arises as to the lawful method of terminating a licence, the circumstances in which the licence came to be granted are most relevant to consider. Where a licence is granted under a contract, it may very well be that the contract will make express provision for those matters which must be observed, but what is to happen where the contract is silent in that regard ? I cannot take the view that there is some cast-iron principle of law which lays down for every type of contract, whatever the circumstances and whatever the purposes for which it was entered into, some rule which is always to operate. In my opinion, the true rule is that the implications of the contract are to be determined by regard to all the relevant circumstances of the case. Thus, in the judgment of the Privy Council in *Canadian Pacific Railway Co.* v. *The King* (1), the following paragraph appears : " Whether any and what restrictions exist on the power of " a licensor to determine a revocable licence must, their " Lordships think, depend upon the circumstances of each " case." That is the only proposition of general application which I find it possible to extract from that authority ; and although the case is not binding on this court, the law there is, in my opinion, laid down with complete accuracy.

That being the position, what is a licensee, in the particular circumstances of this case, entitled to expect in the matter of the termination of his licence ? It is, in my opinion, impossible to answer that question by referring to other cases and different circumstances. I find no assistance in considering the position of a lodger, or that of the guest at an hotel or the spectator in a cinema. It seems to me that the answer to that question must be given in relation to the whole of the circumstances in which this licence came into existence.

(1) [1931] A. C. 414, 432.

It was at first argued by the Attorney-General that there was a rule applicable to all licences, that the only notice to terminate the licence which the licensee can demand is that of a period sufficient to enable him to remove himself and his property from the premises comprised in the licence. He said further, that a consideration, which the county court judge had said was relevant, namely, the time required to find alternative accommodation, was not a matter which ought to be taken into account in fixing the time the defendants were entitled to have. In my opinion, in the circumstances of this case, to say that the implied term of the licence was that the Minister of Health could at any moment turn any one of these individuals out of the flat provided, giving him only sufficient time to move his furniture and himself into the street, would be quite wrong. These people are not inhabitants of this country. Their home was in Gibraltar, and all their relationships in the matter of their way of life, their friendships and their facilities to earn their livelihood were there. They find themselves removed to this country and provision made for them by the government under a licence of this kind, and it must surely be the implied intention of the parties that, if they were turned out by the ministry, they should be given such an opportunity as strangers in the land might require, to enable them to find other accommodation. That consideration ought to be taken into account in deciding what time is to be allowed to such licensees as those in this case to comply with the notice determining their licences.

That deals with one of the points upon which the learned county court judge relied and in my opinion, rightly, but the matter does not end there. The minister's letters intended to determine the two licences were dated June 8, and it is beyond question that the minister, as a matter of law, had the right to determine these licences, and no-one would criticize him if, in order to enforce a reasonable system of administration and discipline, he found it necessary to do so. The notice given by each letter operates as a clear determination of the licence at the expiration of one week. It conveys to the mind of the recipient as clearly as anything can notice that the licence is determined. It goes on, however, to indicate that the recipient of the letter, together with his possessions, is to be removed from the premises within one week. So far as the letter gives that instruction, it was, in my opinion, quite inoperative. The true view is that where a licence is revoked, the licensee has, in spite of the revocation, whatever in the circumstances is a reasonable time to enable him to remove himself and his possessions from the scene of the licence. I have already said that in the circumstances of this case such a reasonable time must extend to whatever is a reasonable time to find alternative accommodation, and, if the day after this notice expired, proceedings had been taken by the minister to eject the defendants, those proceedings would have failed because the defendants were entitled to a reasonable time, and a week was not a reasonable time, to enable them to find alternative accommodation. The circumstance that the threat to remove them before the expiration of what would have been a reasonable time was inserted in the letter does not prevent the letter from being a good notice to determine the licence. That being the position, the county court judge decided that the interval which elapsed between the expiration of the week mentioned in that document and the commencement of these proceedings was a sufficient time to enable alternative accommodation to be found. In view of that finding of fact, the defendants could not complain at the time these proceedings were instituted that they had not been allowed sufficient time in the circumstances to remove themselves and their possessions and find alternative accommodation.

I may at this point refer to the well-known case of *Cornish* v. *Stubbs* (1), where there was a licence to stack timber on a wharf, and Willes J. said (2): " No question arises in this " case whether or not the landlord could have determined such " a licence before the termination of the tenancy, for he " certainly did not do so; and the only question is, whether " the tenant has a right to a reasonable time after the " revocation of the licence to take away his goods; and I am " clear that he has. The rule of law is, that a simple licence, " in order to be binding on the licensor, must be under seal; " but if it is not, the licensee is not a trespasser until the " licensor revokes the licence. Under a parol licence the " licensee has a right to a reasonable time to go off the land " after it has been withdrawn before he can be forcibly thrust " off it; and he could bring an action if he were thrust off " before such a reasonable time had elapsed." He then says lower down: " Applying that view to the present case, I think " that the barons would clearly have thought "—he is referring

(1) L. R. 5 C. P. 334.

(2) Ibid. 339.

to *Wood* v. *Leadbitter* (1)—" that the licence to put the goods " upon the defendant's land involved a right to take away his " goods, and to have a reasonable time for doing so." I do not read those observations as in any way contrary to my statement at the beginning of this judgment, that the right of the licensee in respect of the manner and method of the revocation of his licence and the time to be allowed him to comply with it is, in the absence of express provision, to be ascertained by a consideration of all the circumstances of the case. Willes J. is there referring to the common and simple case of a mere licence to deposit goods on somebody else's premises, and in such a case there is no need to consider other matters except those to which he refers.

If the matter had stood there, the result would be that the minister was entitled to judgment in the action, but it is said on behalf of the defendants that the law is correctly laid down as a matter of general application in the judgment of the Privy Council, to which I have referred. I have already quoted what in my opinion is the only passage of general application to be found in the judgment, but on the facts of that case the Privy Council held that effectually to determine the licence the Crown, which was the licensor, must determine it by notice specifying a date in the future which would give the railway company sufficient time to remove their property from the Crown's land. The Crown, it was said, would have to fix that time correctly and with sufficient accuracy at its own risk, and, if the time limited was too short, then the notice would be a bad notice. From that case is extracted the proposition that a licence can only be revoked by a notice which specifies a sufficient time to enable the licensee to do all those things which on the termination of the licence he is entitled to do, in the matter of removing himself and his property. I do not read this case as purporting to lay down any such general rule. It was a very peculiar case. The Crown was asserting that the railway company was a trespasser in respect of the telegraph poles which it put on the land of the Crown, and the action was based on that view. A licence was set up by the railway company, it was found that in the circumstances a licence should be implied, and the question then arose as to the circumstances in which the licence would be revocable. The question was whether on the facts of that case the licence which was found to exist had been revoked

(1) (1845) 13 M. & W. 838.

by the institution of the proceedings. That question was not decided, but the Board treated the matter as though the institution of the proceedings had not revoked the licence, and set itself to consider what future form of notice would be necessary. The form thought appropriate to that case was that which I have mentioned, and it is introduced by these words: "It appears to their Lordships that this is a case in "which the licence can only be effectively ended." It is clear to my mind that the judgment was directed only to the special facts of that case, and is not of general application as laying down a rule that in every case of licence the notice to revoke must specify a time at the licensor's risk.

In the present case, there is nothing which makes that part of the judgment applicable. In my view, the notice here was a good notice, so far as determination of the licence was concerned. The time specified in it for the licensee to move out was inadequate, but that is immaterial in view of the circumstances that the licensee was, in fact, given sufficient time, as the learned judge has found. The reason why he decided against the minister was that he found in the Privy Council case authority for the proposition that the notice was bad because it did not specify a reasonable time within which the defendants were to go. If, however, a notice had been served terminating the licence, not on June 15, but on the day when these proceedings were instituted, that would have been a good notice as specifying what the judge found was a reasonable time. The notice was therefore a good one for the reasons I have given. The appeal must be allowed.

MacKinnon L.J. I agree. I think the rule of law is that the licensor can revoke his licence at any time, but the licensee has thereafter a reasonable time, having regard to all the circumstances, to comply with the revocation. I do not think there is any rule that the licensor must in his notice of revocation specify the amount of time to which the licensee is to be entitled.

Goddard L.J. I agree. On the question whether the action can be brought by the minister, I have nothing to add to what has been said by my Lord. I think the case is really concluded by the decision of this court in *Minister of Supply* v. *British Thomson-Houston Co.* (1). On the other point, the

(1) [1943] K. B. 478.

position is that if a licensor determines a licence to reside on premises, he is bound to give a reasonable time within which the determination is to take effect, so that the licensee can remove himself and his property. The licensor is bound to give a reasonable time, and, if he does not and takes proceedings before the reasonable time has elapsed, he loses his action, but if he does not give a reasonable time, it seems to me that that does not put an end to the withdrawal of the licence. The licence has been withdrawn, and the withdrawal becomes effective when a reasonable time has expired. The fact that licensor may have limited a time which, as in this case, was wholly unreasonable, does not justify the licensee in sitting down and doing nothing. He should have begun to make arrangements to remove himself, and by the time the proceedings had started he had had ample time. It would be quite wrong to accept the contention of the Attorney-General that we ought to lay down that, where a licence relates to a furnished room or rooms, a week must as a matter of law be a reasonable time.

Appeal allowed.

Solicitors: *Solicitor to Ministry of Health; H. Newcome Wright.*

H. C. G.

BROWN *v.* DRAPER.

C. A.
1944
Jan. 13, 28.

Landlord and tenant—Rent restriction—Dwelling house—Husband the tenant—Matrimonial dispute—Husband leaves house—Wife and child remain in occupation, with husband's furniture—Notice to husband to quit—Payment of rent stopped—No claim by husband to remain in possession—Landlord's right to possession as against wife.

A husband was the tenant of a house on weekly tenancy, and would, in the event of the tenancy being determined, be entitled to the protection of the Rent Restrictions Acts. After occupying the house for some months he left it owing to disputes with his wife, but he left his wife and child in occupation of the house, with the use of his furniture, and continued to pay the rent. Having received notice to quit, the husband stopped paying the rent, but he did not revoke his leave to the wife to reside in the house, nor did he remove his furniture. The landlord later brought proceedings against the wife for trespass, and at the hearing, the husband, who was not made a party to the proceedings, gave evidence that he had no interest in the house:—

Held, (1.) that the husband was still in possession of the house; (2.) that the only way he could be deprived of the protection of the Rent Restrictions Acts was (*a*) by his going out of possession or (*b*) by his having an order for recovery of possession made against him; (3.) that he could not contract to give up his right to claim the protection of the Acts, and could still less give it up by a statement of his wishes or intentions; and (4.) that the landlord could not obtain possession of the house without making the husband a party to the action. The wife's possession must be regarded as that of the husband and could not be treated as unlawful so long as the husband had the right to claim the protection of the Acts. The protection of the Rent Restriction Acts extended to protect a licensee of the tenant.

Appeal from Burton-on-Trent county court.

In 1941 the plaintiff, William Brown, let a house in Linton Road, Castle Cresley, Derbyshire, to Joseph Draper ("the "husband") on a weekly tenancy at a rent of 12*s.* a week. The husband resided at the house with his wife, the defendant, Hilda Draper, and his child until a matrimonial dispute arose which caused him to leave the house in April, 1942. He left his wife and child in occupation, with the use of his furniture, and he continued to pay the rent. Divorce proceedings were commenced in October, 1942. In March, 1943, the plaintiff found the garden of the house overgrown, and, on ascertaining that the husband was no longer living in the house, he gave him formal notice to quite terminating April 5, 1943. From that date the husband ceased to pay the rent, but took no steps to revoke the permission to his wife to continue to live in the house, nor did he remove any of his furniture. In these circumstances the plaintiff began proceedings in the county court against the wife for possession of the house. He did not make the husband a party, and at the hearing the husband gave evidence that, after the expiry of the notice to quit, he had ceased to pay rent, and that he had no further claim on the house. When the wife had applied for alimony in the divorce proceedings he had stated that his wife and son were in the house for which he was paying the rent and that they had the use of his furniture. He now said that, if his wife took care of the furniture, she could continue to have the use of it, and that he would pay the rent of any house she moved to. The wife said she did not claim to be the tenant of the house, but wished to go on living there. The county court judge said that he could not accept the contention that the Rent Restrictions Acts were intended to protect not only the statutory tenant but also his wife and children, and that he ought to restrain the husband from abandoning the matrimonial home. The wife was simply a trespasser, and he had no discretion to refuse the plaintiff relief.

The wife appealed.

Loseby and *Pedler* for the wife. The wife was not a trespasser at any time. She was in the house by the leave and licence of the husband. The husband was entitled to stay on in the house as statutory tenant, and as the house was still occupied by his furniture as well as by his wife and child he must be taken to have retained possession of it under the Rent Restrictions Acts. There is nothing from which the inference can rightly be drawn that husband wished to give up the tenancy.

Fortune for the plaintiff. The husband never claimed to hold over and he has stated in evidence that he is done with the house. The evidence does not establish that the wife is entitled to the benefit of the Rent Restrictions Acts. Under s. 12, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the tenant is defined as including the widow of a tenant dying intestate, and that is the only case in which the wife can claim the benefit of the Acts. Here the husband was served with the notice to quit and he accepted it and has asserted in evidence that he has no claim on the house. It is true that his furniture is still in the house, but that does not mean that he has retained possession. If a tenant is served with notice to quit and does not come to the court and claim the protection of the court, the landlord can go into possession. The Rent Restrictions Acts will not apply if at the end of the tenancy the tenant fulfils no requirements for holding over, such as paying the rent. There was never any need to obtain an order for possession against the husband. [He referred to s. 15 of the Act of 1920.]

Cur adv. vult.

Jan. 28. The judgment of the Court (LORD GREENE M.R., MACKINNON and DU PARCQ L.JJ.) was read by LORD

C. A.

1944

BROWN v. DRAPER.

GREENE M.R. This appeal raises a novel and interesting point under the Rent Restrictions Acts. [He stated the facts and continued] : It is convenient to consider the position of the husband himself under the Acts, in the light of the facts. If he had given up possession of the house to the plaintiff on the expiration of the notice or subsequently he would have placed himself outside the protection of the Acts since that protection is based on the statutory restriction on the power of the court to make an order for recovery of possession. If the tenant voluntarily gives up possession, no occasion for the operation of the statutory restriction arises. The landlord takes possession without the necessity of obtaining an order of the court, and there is nothing in the Acts which prevents him from doing so. But the husband did not give up possession. He not only left the wife in occupation without taking any steps to revoke the licence which he had given her to continue living there, but he left his furniture in the house in her charge. It is obvious that, if she were to vacate the house leaving the furniture behind, he would claim the right to enter the house to take it away. The permission given to the wife to have the furniture was only to last so long as she took care of it. In these circumstances, the husband is, in our opinion, still in possession of the house : *Savage* v. *Dent* (1), cited in Cole on Ejectment, pp. 110–11. Apart from his statement in the witness-box that he had no further claim on it, he would be entitled to the protection of the Acts. To obtain possession from him, the plaintiff would have to bring an action for recovery of possession against him, and an order could only be made if the statutory requirements were satisfied.

It is said, however, and the county court judge appears so to have held, that, in view of the statements made by the husband in the witness-box, his right to claim the protection of the Acts has gone. We do not take this view. There are, we think, only two ways by which a tenant whose contractual tenancy has come to an end can lose the protection of the Acts. One is, as we have stated, by giving up possession. The other is by an order against the tenant for recovery of possession. We do not see on what ground it can be said that a tenant who remains in possession can, by a mere statement of his intentions and wishes in the witness-box, in an action to which he is not a party, confer on the court a jurisdiction of which the statute deprives it. Unless and until the husband

(1) (1737) 2 Strange 1064.

gives up possession the plaintiff can only obtain possession as against him by obtaining an order, and the power of the court to make such an order is limited by statute. A tenant remaining in possession cannot lawfully contract not to avail himself of the protection which the Acts give him, if and when the landlord takes proceedings against him to recover possession. If he wishes to place himself outside the protection of the Acts without putting the landlord to the necessity of taking proceedings, his proper course is to deliver up possession. Unless and until he does so, he is under the shelter of the Act, whether or not he so desires. No contract, and a fortiori, no mere statement of his wishes or intentions, can deprive him of the statutory protection. Were the landlord now to take proceedings against the husband to recover possession, the husband could, in our opinion, say that he had changed his mind and that he now wished to avail himself of the protection of the Acts. If he offered to pay all arrears of rent, the court might or might not come to the conclusion that it was not reasonable to make an order—what the result of the proceedings might be is immaterial. The possibility of a tenant changing his mind where he himself has brought the contractual tenancy to an end by notice and being entitled, nevertheless, to claim protection, is envisaged by para. (*c*) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

We may summarize the position of the husband as we see it as follows: (1.) He was at the date of the trial, and presumably still is, in possession of the house. (2.) The only ways in which he can be deprived of the protection of the Acts are (*a*) by giving up possession, in which case no order for recovery of possession against him is required; or (*b*) by having an order for recovery of possession made against him. (3.) He cannot contract to give up his right to claim protection: a fortiori, his mere statement in the witness-box that he had no further claim to the house could not operate to deprive him of that right. These propositions appear to us to be established by the language of the Acts itself. If authority is needed for them, it is we think to be found in the decision of this court in *Barton* v. *Fincham* (1); and we would refer particularly to the judgment of Scrutton L.J. in that case. The only passages which we find it necessary to quote are these (2): " He can leave of his own free will, surrendering his

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(1) [1921] 2 K. B. 291.

(2) Ibid. 297, 298.

C. A.

1944

Brown
v.
Draper.

" tenancy . . . . But if he is in possession and unwilling to " give it up, possession can only be obtained by order of " a court," and " If the tenant is willing to go out, I do not " see why any order is wanted ; let him go ; but as at present " advised I do not see any reason why the judge on being " satisfied that a tenant is *then* ready to go (*not that he was " once willing but has changed his mind*) should not make an " order for possession." The words which we have italicized are pertinent to the opinion which we have expressed as to the right of the husband to change his mind.

The present proceedings are brought, not against the husband, but against the wife who, it is said (and the county court judge so held) is a mere trespasser. An order against her, assuming that it ought to be made, could not be effective against him. It would not entitle the plaintiff to remove the husband's furniture. It would not deprive the husband of the right to claim the protection of the Acts. At common law the wife would, it is true, have no defence to the action. Moreover, she cannot in her own right claim the protection of the Acts since she is not the tenant but a mere licensee. It is not suggested that she is a sub-tenant under her husband. It is said, however, that, in view of the Rent Restrictions Acts, the plaintiff cannot obtain an order for recovery of possession against the wife without joining the husband as a defendant and obtaining an order against him also.

This argument raises an important question, the answer to which will affect many cases of common occurrence. We will take one example. The tenant of a house held for a fixed term goes abroad on military service, leaving his wife in the house. While he is abroad, the lease comes to an end. At common law the wife thereupon becomes a trespasser and the landlord can take proceedings to recover possession from her. Do the Rent Restrictions Acts prevent the landlord from taking this course ? In our opinion, they do. If the contrary were true, the consequences would be lamentable. In such a case the possession of the wife must, we think, be regarded as the possession of the husband and cannot be treated as unlawful so long as the husband has the right to claim the protection of the Acts. As we have already pointed out, the only ways in which the husband can lose the protection of the Acts are by giving up possession, which in the case assumed he can only do by removing his wife (or, perhaps, by revoking his permission to her to live there) and removing any furniture, etc., which belongs to him, or by having an order for possession made against him. The right conferred on the husband to claim the benefit of the Acts entitles him, if, at the expiration of the tenancy, he remains in possession (and possession by his licensee or by leaving, for example, his furniture in the house is sufficient for that purpose), to remain in possession of the house unless and until an order is made against him, and the landlord is no more entitled to treat his licensee as a trespasser than he is entitled to treat the tenant himself as a trespasser. The protection of the Acts, in our opinion, extends to protect a licensee of the tenant, not because the licensee can claim the protection of the Acts in his or her own right, but because the tenant is a necessary party to the proceedings, and no order can be made against his licensee in his absence.

If the view which we have expressed is wrong, a curious situation would arise. To test it, let us assume that all the contents of the house belong to the wife. The landlord brings an action against her alone and obtains an order pursuant to which he evicts the wife and removes her furniture. He thus obtains possession and proceeds to live in the house himself. The husband then returns and claims the house. How could he obtain any benefit from the Acts ? The landlord does not need to obtain an order for recovery of possession, for he is already in possession, and it is only by the fetter put on the power of the court to make such an order that the tenant is given any right to protection. If, on the other hand, the tenant in such a case is entitled to say that his rights under the Acts have not been affected by the order against his wife it can only be, as it seems to us, on the ground that the order was made without jurisdiction and that he must, accordingly, be treated, for the purposes of the Acts, as still being in possession and thus entitled to claim protection. In our opinion, the latter view is correct, and, if we are right, it follows that the court has no jurisdiction to make an order against the wife unless the husband is a party and an order is made against him as well. If the views above expressed are correct, they cover the present case, and the proceedings are defective for want of parties. The action, therefore, ought to have been dismissed.

It may well be that, in the circumstances of this case, the wife will not secure any lasting benefit from this decision since, if the landlord brings a fresh action, making the husband a party, it may be that the husband will submit to an order.

On the other hand, he may change his intention, since he is prepared, as he said in the witness-box, to pay the rent of a house for his wife, and he may very well take the view that he would prefer that she should continue to live in this house rather than be put to the trouble and expense of finding another, the rent of which might be higher than that at present payable. These considerations are not, however, relevant to the present appeal, which must be allowed with costs here and below.

Appeal allowed.

Solicitors: *Gibson & Weldon, for C, Leslie Hale & Mander, Coalville; Geo. Thatcher & Son, for A. H. & H. W. Timms, Swadlincote.*

H. C. G.

1944.
Jan. 27.

JACKSON *v.* FISHER'S FOILS, LIMITED.

Emergency legislation—Control of employment—Essential work—Dismissal of employee—Reinstatement—Payment of wages, but work not provided—Essential Work (*General Provisions*) (*No.* 2) *Order,* 1942 (*St. R. & O.,* 1942, *No.* 1594), *art.* 5, *para.* 3.

Where a person carrying on an undertaking scheduled under the Essential Work (General Provisions) (No. 2) Order, 1942, is directed by a national service officer, under art. 5, para. 3, of the order, to reinstate in his employment an employee who has been dismissed, it is not sufficient, to comply with the direction, merely to put the employee back on the pay roll without providing him with work unless it be proved to the satisfaction of the court that no work is available.

Hodge v. *Ultra Electric, Ld.* [1943] K. B. 462, discussed and distinguished.

Case stated by Middlesex justices.

At a court of summary jurisdiction sitting at Wealdstone an information was preferred by the appellant, Jackson, a national service officer acting for the Minister of Labour and National Service, under reg. 58A of the Defence (General) Regulations, 1939, and the Essential Work (General Provisions) (No.2) Order, 1942, against the respondents, Fisher's Foils, Ld., that they, being persons carrying on an undertaking scheduled under the order, did, on January 12, 1943, fail to comply with a direction to reinstate in his employment in the undertaking one John Messias, a specified person, the local appeal board having certified that, in their opinion, the dismissal of the employee on the ground of misconduct was not justified.

At the hearing it was proved or admitted that Messias had been employed by the respondents since December, 1941, as a grinding machine operator at a basic wage of 3*l*. 12*s*. 0*d*. per week. On December 11, 1942, he was dismissed by the respondents for alleged serious misconduct. He appealed under art. 5, para. 2, of the order, and on January 5, 1943, his appeal was heard by the local appeal board, who found that the dismissal was not justified, and was, therefore, ineffective, and issued a certificate to that effect. On January 8 the appellant, as national service officer, directed the respondents, under art. 5, para. 3, of the order, to reinstate Messias on January 12 in the employment from which he had been dismissed. On January 12 Messias presented himself for work at the respondents' undertaking, but was not given work although he was put back on the pay-roll. Another workman had been up-graded and given charge of the machine previously worked by Messias. Messias was paid his wages of 3*l*. 12*s*. 0*d*. per week by the respondents until he left voluntarily on February 9 to work elsewhere.

The justices came to the conclusion that by taking Messias back into their undertaking at the same basic wages the respondents had complied with the order, and they dismissed the information. The appellant appealed.

Sir D. Maxwell Fyfe S.-G. and *Arthian Davies* for the appellant. The justices have wrongly held that the employee had been reinstated within the meaning of art. 5, para. 3, of the order. The natural and primary meaning of "to "reinstate" as applied to a man who has been dismissed without justification is to replace him in the position from which he was dismissed and so to restore the status quo ante the dismissal: see per Lord Cooper, Lord Justice-Clerk, in *Wm. Dickson, Ld.* v. *Patterson* (1). The word "employment" in the order connotes a right to be given work as well as a right to receive payment. *Hodge* v. *Ultra Electric, Ld.* (2) is distinguishable because there the court was satisfied that the employers had done everything in their power to find work for the employee, and that there was no work available. There was no such finding in the present case. The onus was on

(1) 1943 S. C. (J.) 78, at p. 83.

(2) [1943] K. B. 462.

1944

JACKSON v. FISHER'S FOILS, LD.

the respondents to prove that compliance with the direction was impossible.

Valentine Holmes for the respondents. Throughout this order a distinction is drawn and carefully maintained between employment and work. " Employment " is invariably used in the sense of the contractual relationship between master and servant, while " work " is used to define the particular service which the servant renders to the employer. " Reinstatement " in employment " does not put the employer under any obligation to give work. No such obligation is imposed by the ordinary law of contract, and an employer would break no statutory regulation or contractual obligation by paying a workman wages while providing no work. Why then, after dismissal and reinstatement, should there be any such obligation as is contended for by the appellant. *Hodge* v. *Ultra Electric, Ld.* (1) is not distinguishable from the present case. The respondents have not sought to flout the direction of the national service officer, but work can only be made available by dismissing another employee.

HUMPHREYS J. I do not think it is necessary, and if not necessary it certainly is not desirable, to express any views of a general character about this Essential Work (General Provisions) (No. 2) Order, 1942. Certain general observations, with which I respectfully concur, have been made in the Court of Session, in *W. Dixon, Ld.* v. *Patterson* (2).

The question which is raised in the present case is whether the conduct of the respondents is or is not a compliance with the direction of the national service officer, and that necessitates the consideration of what is the meaning of the expression, " to reinstate " in your employment—if you are the owner of a factory—a man whom you have dismissed.

That sort of question was considered in the Scottish case to which I have referred, and the Lord Justice-Clerk, Lord Cooper, in his judgment, expressed himself as follows : " The " natural and primary meaning of ' to reinstate,' as applied " to a man who has been dismissed (ex hypothesi without " justification), is to replace him in the position from which " he was dismissed and so to restore the status quo ante the " dismissal " (3). I respectfully agree with that definition of the meaning of the word " reinstate." A question under this

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(1) [1943] K. B. 462.

(2) 1943 S. C. (J.) 78, 83.

(3) Ibid., p. 85.

1944

JACKSON
v.
FISHER'S
FOILS, LD.

Humphreys, J.

order came before this court, last year—*Hodge* v. *Ultra Electric, Ld.* (1). There a woman was employed in a factory, and an application was made for leave to terminate her employment, not for any fault at all, but because there was not enough work for her. She was what is called redundant, and permission was given to terminate her employment on that ground. Subsequently, following a recommendation of the local appeal board, the national service officer revoked the permission that he had given for the termination of her employment and issued a direction to the respondents for her reinstatement in their employment as from a specified day. On the specified day she attended and offered herself for work. She was told, as the fact was, that there was no work available for her, and she was not allowed to remain on the respondents' premises, but was paid her wages. Thereafter, she attended from time to time, but was never given any work to do, only for the reason that there was no work to give her. In those circumstances the employers were prosecuted for failing to comply with the terms of the direction, and the question arose whether their action was a compliance with the direction. The justices held that the employee had been reinstated. The Crown argued to the contrary. In this court, on the case stated, Mr. Valentine Holmes, for the respondent employers, argued that the word " employment " is used in two senses, first, strictly in the sense of the relationship between master and servant, and secondly, colloquially, in the sense of the word " work." He said : " Strictly, ' work ' defines the particular " nature of the service rendered to the employer, but through- " out this order the distinction is carefully maintained between " employment and work, ' employment ' being used in the " sense of the relationship between the parties, while ' work ' " is confined to the work which the employee does." Mr. Holmes has favoured us with a repetition of that argument in this case. He also argued in that case that, even if his first argument was not accepted, there was a perfect answer to the prosecution, for nobody could be convicted of a criminal offence in failing through no fault of his own to do that which he could not do. Inasmuch as the sole reason for the failure to give work to the woman was that there was no work to give her, the divisional court held that the respondent employers had not committed any offence in failing to obey the terms of the direction. That is the ratio decidendi of

(1) [1943] K. B. 462.

that case, but the court also had to consider the first argument of Mr. Valentine Holmes, and I think it is clear from the judgment of certainly two of the three learned judges that they declined to accede to it. The leading judgment was given by Charles J. After saying that the respondents had not exhibited any desire to evade responsibility, and had done all that they could do to carry out the order, Charles J. said: "It appears to me that in a case of this kind the word "'reinstatement' connotes the putting back, so far as is "possible, of the person dismissed into the same position as "that which he occupied when the dismissal took place. "I cannot give accord to the submission that the idea of giving "work is not to receive any consideration. I think it must; "because work and wages are very closely knit together under "the regulations and the Essential Work Order. Equally "do I feel, however, that when employers are directed to "reinstate an employee, and they do all that the respondents "did here to put that employee back in his previous position, "and only fail to provide him with work because there is no "work for him to do, those employers have, in fact, reinstated "the employee" (1). Tucker J., in his judgment, said: "It appears to me that reinstatement involves putting the "specified person back, in law and in fact, in the same position "as he occupied in the undertaking before the employer "terminated his employment. In my view, on the facts "before them, the justices were perfectly entitled to come to "the conclusion that it had not been proved to their satis-"faction that there had been any failure on the part of the "respondents to comply with the direction given them by the "national service officer. If there had been anything in the "nature of a refusal by the respondents on August 10 or "thereafter to provide Mrs. Birch with suitable work when "such work was available, different considerations would "arise" (1). Croom-Johnson J. put the matter in this way: "I assume that there was an obligation on the respondents "to find some work for Mrs. Birch, but I cannot think that "there was an obligation to find work every day, or to find "what was described in one of the cases to which we were "referred as continuous work." Then he said: "In other "words, the obligation on the employer is an obligation to "give work if there is work available, and not an absolute "obligation to give work when there is none in fact" (2).

(1) [1943] K. B. 462, 465, 466. (2) [1943] K. B. 462, 466.

1944

JACKSON
v.
FISHER'S
FOILS, LD.

Humphreys, J.

Mr. Holmes has argued that the facts of this case are comparable to those in *Hodge* v. *Ultra Electric, Ld.* (1), but, in my opinion, they are the exact reverse, and, so far as the observations of the learned judges in that case are in pari materia here, it seems to me that they are entirely in favour of the view which I have myself formed, viz., that an employer who is directed to reinstate in his employment a person whom he has dismissed, is not complying with that direction by putting that person on the pay roll and doing nothing more.

Having expressed that opinion, I go on to consider whether there is anything in the findings in this case which would indicate, however remotely, that the sort of consideration which induced the learned judges in *Hodge* v. *Ultra Electric, Ld.* (1), to express the view that they did, is present in this case. If I thought that the matter was doubtful, I should be in favour of sending the case back to the justices in order that they might answer in terms the question : " Do you find that " there was work available for this man, or do you find that " there was not work available for this man ? " but, in my opinion, they have sufficiently explained the reason why, and the circumstances in which, Messias, when he presented himself for work, was not given it. I have read the material passages, and I need only say that, in my view, it is made clear enough that Messias, for some reason or other—we are not concerned with whether it was a good reason or a bad reason—had become obnoxious to the management of this concern. They came to the conclusion that it was desirable in the interests of their factory, and, therefore, in the public interest, that that man should cease to be employed at that place, and that is why they dismissed him. I can find nothing in the case which would indicate that they made any effort to get him work, or that they took any step of any sort which would justify them in saying : " We did our best, but, for this, that, or the other " reason, we could not put this man back at work." I, therefore, come to the conclusion that this was a case of a deliberate refusal. I do not mean that they were not acting bona fide in the matter. I have no doubt that they were. I should assume always that the management of a factory, in dismissing a man, do so in what they believe to be the interests of the factory and not from spite or any such motive as that. My view is that a man is not " reinstated in his employment " when he is just put on the pay roll, any more than it could be

(2) [1943] K. B. 462, 465.

argued that a man was reinstated in his employment if what the employer did was to say : " We will not let you come near " the premises, but we will give you a pension for life equal to " the wages that you were getting before." That, to my mind is very much what happened here. For those reasons I think the justices were wrong in dismissing this information.

ASQUITH J. I agree. If the matter were res integra, I personally should find some difficulty in resisting the argument of Mr. Valentine Holmes under his first head. That argument, if I understand it rightly, was this: " 'Reinstatement' means reinstatement in his employment, " and his employment means the contractual position which " he occupied as against his employer before his dismissal. " That contractual position permitted the employer to with- " hold work from the employee providing he paid him his " wages." I am satisfied, however, that the matter is covered by authority. It appears that this precise argument was addressed by Mr. Valentine Holmes to the court in *Hodge* v. *Ultra Electric, Ld.* (1), where, for instance, he argued : " In " the present case Mrs. Birch was reinstated so far as her " relationship with the respondents was concerned. She was, " therefore, reinstated within the meaning of the order." The court rejected that argument.

CASSELS J. I agree that this appeal should be allowed. If no work is available, it may well provide the employer with an explanation of a reinstatement in which the only thing done is to pay the wages : see *Hodge* v. *Ultra Electric, Ld.* (1), but, where work is available, a man who is not working is unemployed. He can scarcely be said to be reinstated in his employment or his work, within the meaning of this order, by attending only at pay time. I, therefore, do not think that the respondents complied with the national service officer's order merely by taking Messias back into the undertaking at the same basic wage. I think that the justices came to a wrong decision in point of law.

Case remitted.

Solicitor for appellant : *Solicitor, Ministry of Labour and National Service.*

Solicitors for respondents : *J. H. Lambert & Co.*

A. W. G.

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(1) [1943] K. B. 462, 465.

CUMMINS *v.* HOLLOWAY BROS. (LONDON), LIMITED.

C. A.

1944
Jan. 28.

Emergency legislation — Control of employment — Essential work — "Recognized holiday"—Holiday granted at request of Ministry of Labour—Essential Work (Building and Civil Engineering) Order, 1942 (*St. R. & O.*, 1942, *No.* 2044), *art.* 1, *para.* 2.

The defendants were engaged in carrying out works at a "scheduled site" within the meaning of the Essential Work (Building and Civil Engineering) Order, 1942, and the plaintiff was a "specified person" employed by them on that site. In accordance with a recommendation from the Ministry of Labour that Saturday, June 12, 1943 (the Saturday before Whit Sunday), should be observed as a holiday as well as Whit Monday, the defendants closed their works on that day. The plaintiff presented himself for work, and, being refused, brought an action claiming one hour's wages, being the difference between the wages actually earned by him and the wages payable for the "normal working hours" in that week on the basis that Saturday was not a holiday. It was found that it had been the practice of the defendants to give holidays on Whit Monday and Tuesday, but never before on the Saturday:—

Held, that Saturday, June 12, was not a holiday "recognized as such" within the meaning of art. 1, para. 2, of the order, and could not become so by the employer's unilateral decision to treat it as a holiday, and that, therefore, the plaintiff was entitled to recover.

APPEAL from Bloomsbury county court.

The defendants, Holloway Bros. (London), Ld., were contractors engaged in carrying out works at a "scheduled site" within the meaning of the Essential Work (Building and Civil Engineering) Order, 1942 (1), and the plaintiff was a carpenter

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(1) By art. 1, para. 2, of the Essential Work (Building and Civil Engineering) Order, 1942: "'holiday' means a day recognized as such in a particular scheduled undertaking either generally or as regards any persons or classes or description of persons, and in that case the day shall only be treated as a holiday for those persons or classes or description of persons;"

Art. 4, para. 1. (*d*) ". . . . the person carrying on the undertaking shall in respect of every prescribed period pay to every specified person a sum which is not less than the normal wage for the prescribed period, if that person is during the normal working hours (i,) capable of and available for work; . . . .

"For the purposes of this subparagraph 'normal working 'hours' means in relation to a week forty-four hours, in relation to a day other than Saturday eight hours, and in relation to Saturday four hours;"

Para, (4.) "Where any holiday occurs on any day or during any week, the normal working

C. A.
1944
Cummins v. Holloway Bros. (London), Ld.

employed by them on those works. On February 27, 1943, the Ministry of Labour and National Service issued a circular to employers, including the defendants, intimating the view of the government that in the fourth year of the war the need for holiday breaks was even greater than before, and recommending that the Saturdays before the usual bank holidays, as well as the bank holidays themselves, should, so far as possible, be treated as approved holidays. The defendants, accordingly, notified in advance that Saturday, June 12, as well as Whit Monday, June 14, would be a holiday for all persons employed in their undertaking. The men's trade union protested against the closing of the job on the Saturday on account of the financial loss to the men, but the defendants adhered to the government's recommendation and closed on the Saturday as well as the Monday. The plaintiff, with others, presented himself for work on Saturday, June 12, but was not admitted. Having worked only thirty-five hours in the week June 12–18 inclusive, instead of the thirty-six which would be the " normal working hours " for that week, the plaintiff brought a test action against the defendants claiming one hour's wages. Evidence was given that it had always been the defendants' practice to give their men two days' holiday at Whitsun, on Whit Monday and Tuesday, and that Saturday had been substituted for Tuesday in accordance with the government recommendation which, it was admitted, had no binding force. The county court judge held that the Saturday was not a recognized holiday within the definition in art. 1 of the order, and gave judgment for the plaintiff. The defendants appealed.

J. W. Morris K.C. and *J. R. Ogilvie Jones* (*Bassett* with them) for the defendants. Saturday, June 12, was a recognized holiday. The word is " recognized " not " agreed," and if it had been intended that the men's concurrence was to be necessary, nothing would have been easier than to say so. The order did not deprive the employer of the right to decide

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" hours of that day or that week " shall be treated as reduced by " the extent of the holiday and " the normal working hours attributable to that holiday."

Art. 9: " The provisions of " Articles 4, 5, 6 and 7 of this " Order shall apply to scheduled " works, to scheduled sites, and " to persons specified under " Art. 8 (4.) . . . . as they apply " to persons carrying on scheduled " undertakings and to specified " persons."

to give his men an extra day's holiday, such as the Saturday before Whit Monday, and, if the employer so decided, that became a recognized holiday in that undertaking. That right must not, of course, be so exercised as to defeat the purpose of the order, and it would be a question of fact in each case whether the employer was acting in good faith or to avoid the payment of wages. Here there was no such element, for the defendants were carrying out the ministry's request.

Beney K.C., and *Dare* (*Humfrey Edmunds* with them) were not called on to argue.

LORD GREENE M.R. This appeal raises a short point the answer to which depends on the meaning of the definition of "holiday" in art. 1, para. 2, of the Essential Work (Building and Civil Engineering) Order, 1942.

The defendants say that Saturday, June 12, must be regarded as having been a holiday, and that, accordingly, under art. 4, para. 4, the working hours of that Saturday ought to be deducted from the normal working hours. The word "holiday" in the order is defined as meaning "a day recognized "as such in a particular scheduled undertaking either generally "or as regards any persons or classes or description of "persons," and, in the latter case, the day is only to be taken as a holiday for those persons or those classes or descriptions of persons. For the purpose of that definition, the defendants are clearly to be regarded as a "particular scheduled under-"taking," so "holiday," for the purposes of this case, means a day recognized as such in the undertaking of Holloway Bros. (London) Ld. It was not suggested that the recommendation issued by the ministry was alone sufficient to make June 12 a "recognized" holiday. The county court judge, after hearing the evidence, held, and, indeed, on the evidence it was impossible for him to hold otherwise, that the Saturday before Whitsuntide had never in the normal way been regarded as part of the Whitsun holiday. He says: "There is some "conflict of evidence with regard to the Tuesday after Whit "Monday, but until the year 1943 there appears to have been "no question but that the Saturday was part of the ordinary "week. The holiday on the Saturday was, therefore, a "novelty." In those circumstances, he held that Saturday, June 12, was not a day "recognized" as a holiday within the meaning of the definition, and, in my opinion, he was right. He did not misconstrue the definition, nor is his finding of fact to be assailed.

The only ground on which the appeal is rested is that he misconstrued the definition. It was said that that definition meant that, whenever an employer decided that a particular day should be a holiday, that decision made that day a day recognized as a holiday. Putting it in another way, it is said that the order of 1942 did not take away from an employer the right which it is said he had under an ordinary contract of employment, to decide what day should be a holiday. I need not inquire what the position would be apart from the provisions of this order. All we are concerned with is what the order means. In my opinion, it is impossible to construe the words " recognized as such " as referring to a unilateral decision by the employer as to what day should or should not be a holiday. If the construction contended for is the right one, I can see no means by which a limit could be put on the power of the employer to proclaim a holiday on any day he pleased. It was said that the construction did not lead to that extreme result, because, if he went too far, he would be defeating the purpose of the order and he might be in the wrong if he did that, but I cannot see any justification for imposing any limit of that kind if the construction contended for is right. If that construction is right it must, in my opinion, go the whole way. The word " recognized " is very common, particularly in connexion with the phrase " recognized holidays " in many industries, and it is to be found in industrial agreements and industrial awards. " Recognized " must, in my opinion, mean that a day is recognized in the industry or occupation in question as a holiday—" recognized," not " dictated," and something in respect of which a worker in the industry or enterprise would say without doubt : " Why, of course, we always treat that " as a holiday." That could be said, for instance, of August Bank Holiday, which in every, or nearly every, industry is treated as a recognized holiday.

There is no need to attempt to give an exhaustive definition or place an exhaustive construction on the word. It is sufficient for the purposes of this appeal to say that the argument that " recognized " means that the employer can himself decide what day is to be a holiday is wrong. The judge, in his judgment, seemed to think that a day which it was agreed by both the employer and the employee should be a holiday would be a recognized holiday within the meaning of the definition. I do not propose to express any opinion on that. It may well be that the matter is not free from doubt. It might be that an employer might agree with his men to take an extra day a week off all through the year, and it would require to be argued on the facts of any such case whether or not an agreement of that kind could convert the day in question into a recognized holiday. I merely refer to this because the judge appears to have thought that an agreement would be sufficient and I wish to reserve my opinion upon that point. I only say on the present appeal that the judge put a correct interpretation on the definition clause, and in my opinion his judgment is unassailable. The appeal must be dismissed with costs.

MACKINNON L.J. I agree. This is a very hard case on the defendants, who did their best to obey the order of 1942, and also to comply with the recommendation of the Ministry of Labour, but we must not allow a hard case to make bad law. As to the construction of the order, on its terms I am constrained to hold that this Saturday was not a "recognized "holiday" within the ambit of the definition. Therefore, the appeal fails.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors for defendants: *Kenneth Brown, Baker, Baker.*
Solicitors for plaintiff: *Arnold Carter & Co.*

J. W. H.

PAPRIKA, LIMITED *v.* BOARD OF TRADE.

1944
Jan. 11, 12, 21.

Appeal — Quarter Sessions — Limitation of time to enter appeal — Need of strict compliance—Power of quarter sessions to extend—Sentence—No evidence given before quarter sessions—Finality of decision.

Emergency legislation—Control of industry—Acquiring rationed goods otherwise than against coupons—Penalty—Three times the price of article sold—Inclusion of purchase tax in price—Consumer Rationing (*No.* 8) *Order,* 1941 (*St. R. & O.,* 1941, *No.* 2000), *art.* 1 (2.); *Defence* (*General*) *Regulations,* 1939, *as amended, St. R. & O.,* 1942 *No.* 501, *art.* 1 (1E) (ii.).

On an appeal to quarter sessions from a court of summary jurisdiction, the requirements of s. 31, sub-s. 2, of the Summary Jurisdiction Act, 1879 (as amended by the Summary Jurisdiction (Appeals) Act, 1933) and of s. 50 of the Metropolitan Police Courts Act, 1839, prescribing the times within which notice of appeal must be given and recognizances entered into, must be complied with strictly, and, in the absence of any express power to waive the conditions, quarter sessions have no power to do so.

On an appeal against sentence, the same strictness of proof is not demanded as in the case of an appeal against conviction, and where, in the former case, the appeal is allowed to proceed on the basis of the evidence given in the court below without objection being raised on behalf of the appellant, he cannot thereafter be heard to say that for that reason alone the sentence imposed on him cannot stand.

In proceedings under the Consumer Rationing (No. 8) Order, 1941, art. 1 (2.), for acquiring goods without a surrender of the appropriate number of coupons, for which offence the penalty imposed by St. R. & O., 1942, No. 501, art. 1 (1E) (ii.) is an amount equal to three times the price which the articles in question might be expected to fetch if lawfully sold, the court, in determining the price of the goods to assess the amount of the fine to be imposed, is entitled to have regard to the amount of purchase tax attracted by the sale, since the amount of the tax forms part of the price which the buyer has to pay.

CASE stated by City of London quarter sessions.

On July 13, 1942, the appellant company, Paprika, Ld., were summoned before the metropolitan police magistrate sitting at Bow Street for that they did, on January 22, 1942, unlawfully acquire rationed goods, to wit, mercerised cotton lawn otherwise than against the surrender of the appropriate number of coupons, contrary to art. 1 (2.) of the Consumer Rationing (No. 8) Order, 1941, and reg. 55 of the Defence (General) Regulations, 1939. It was proved or admitted that the goods in question were sold to the appellant company at the price of 562*l.* 10*s.* 0*d.*, plus 187*l.* 10*s.* 0*d.* purchase tax. By art. 1 (1E) (ii.) of St. R. & O., 1942, No. 501, the penalty for the offence is "an amount equal to three times the price "which the article might be expected to fetch if lawfully "sold." The magistrate ordered the appellants to pay a fine of 2,000*l.* and 25*l.* costs. The appellants gave notice of appeal to quarter sessions within the prescribed time against sentence only. Before the hearing of the appeal on November 24, 1942, applications were made to the court on behalf of the appellants for leave to appeal against conviction as well as sentence, and for leave to make the consequential amendment to the notices of appeal. The applications were refused.

On the hearing of the appeal against sentence no evidence was called and no admissions were made. Quarter sessions being satisfied that the appellants had pleaded guilty before the magistrate on the advice of counsel and not by inadvertence, were of opinion that they had no power to give leave to appeal against conviction, and that they had power in law to confirm the penalty of 2,000*l.* The appellants appealed.

Slade K.C. and *Christmas Humphreys* for the appellants. Quarter sessions were wrong in holding that they had no jurisdiction to give leave to appeal against conviction. It is clear that an appeal will lie against a conviction on a plea of guilty since it is provided by s. 50 of the Police Courts Metropolis Act, 1839, that an appeal lies from any decision of a metropolitan police magistrate where the fine is more than 3*l.* or the period of imprisonment more than one calendar month. There is no qualification to the right of appeal there given, such as " if the defendant does not plead guilty " which appears in s. 19 of the Summary Jurisdiction Act, 1879, and in the Criminal Justice Administration Act, 1914, s. 37, sub-s. 1. There was, here, an appeal against sentence of which notice was duly given within the prescribed time, and it is submitted that quarter sessions had jurisdiction to amend the existing notice of appeal by adding an appeal against conviction. With regard to the hearing of the appeal against sentence, quarter sessions were wrong in acting without having evidence before them. An appeal against sentence, like any other appeal to quarter sessions, is a rehearing and the onus is on the prosecution to support the decision of the justices, otherwise the appeal must be allowed : *Rex* v. *Kent Justices* (1). No evidence was called before quarter sessions and no admissions on behalf of the appellants were made by counsel, and, that being so, the court was not entitled to dismiss the appeal. Lastly, the fines imposed by the magistrate were in excess of the maximum permitted by St. R. & O., 1942, No. 501, art. 1 (1E) (ii.). The magistrate, in fixing the amount of the fines, wrongly took into consideration the amount of the purchase tax as well as the price the goods

(1) [1936] 1 K. B. 547.

might be expected to fetch if lawfully sold, but purchase tax forms no part of the price. The true test is the value of the goods if sold in a lawful market, as to which there was no evidence before quarter sessions, but, even if the sum admittedly paid by the appellants be taken, three times that sum if purchase tax is excluded is considerably less than the fines imposed.

Valentine Holmes for the Board of Trade. Quarter sessions were right in holding that they had no jurisdiction to give leave to appeal against the convictions. The appellants were hopelessly out of time when the application to quarter sessions was made. The Summary Jurisdiction Act, 1879, deals with the procedure to be followed on appeals to quarter sessions, and s. 31, sub-s. 2, enacts that the appellant shall give notice of appeal within fourteen days after the date on which the decision of the court of summary jurisdiction was given, while sub-s. 3 enacts that he shall enter into recognizances within twenty-one days. The word used in each case is " shall," which makes the giving of the notice in proper time an absolute condition precedent to the right to appeal. In *Ex parte Ashton* (1) it was held that failure to comply with the requirements of the section in regard to time was incurable: see also *Reg.* v. *Glamorgan Justices* (2) and *Ex parte Curtis* (3). It is true that the Quarter Sessions Act, 1849, by ss. 3 and 9, gives power to amend a notice of appeal but it is not possible by amendment to turn an appeal against sentence into an appeal against conviction. With regard to the hearing of the appeal against sentence, it is the exception rather than the rule for witnesses to be called in the case of an appeal against sentence only, since the procedure is not so strict as in the case of an appeal against conviction. Where no objection is taken by the appellant, quarter sessions is entitled to have regard to facts proved or admitted in the court below. On the evidence before the magistrate, quarter sessions were justified in including the amount of the purchase tax involved when assessing the price at which the goods could be expected to fetch if lawfully sold, as it clearly formed part of the price which a purchaser would expect to pay for them.

Cur. adv. vult.

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(1) (1912) 76 J. P. 383.
(2) (1890) 24 Q. B. D. 675.
(3) (1877) 3 Q. B. D. 13.

1944

PAPRIKA, LD. *v.* BOARD OF TRADE.

Jan. 21. LAWRENCE J. read the following judgment: This is an appeal by way of case stated by the appeal committee for the city of London, and three main points are raised by the appellants. First, that no evidence was called or admission made before the committee (as is stated in the case), and that the case ought to be remitted for this reason; second, that the committee were wrong in holding that they had no jurisdiction to give leave to appeal against conviction in the present case; and, third, that the fine imposed by the magistrate was in excess of that authorized by reg. 55 of the Defence General Regulations, 1939, because the price of the goods which the appellant company purchased without coupons was held to include the amount of the purchase tax.

The appellants pleaded guilty before the magistrate and were fined 2,000*l.* They then gave notice of appeal against sentence but not against conviction, but at the hearing before the appeal committee they applied for leave to amend their notice of appeal so as to appeal also against their conviction. The appeal committee held that they had no power to give leave to appeal against conviction, and the questions of law and fact as to the amount of the fine were then gone into on the basis of the evidence before the magistrate and without hearing any evidence. No objection to this course was taken by the appellants' counsel, and we have been informed that it is the general practice in London not to call evidence where the appeal is only against sentence.

On the second question, I am of opinion that the committee were right in holding that they had no power to give leave to appeal against conviction in the circumstances. By s. 31, sub-s. 2, of the Summary Jurisdiction Act, 1879, as amended by s. 1, sub-s. 1 (ii.) (iii.) of the Summary Jurisdiction (Appeals) Act, 1933, notice of appeal must be given within fourteen days of the conviction, and by sub-s. 3 recognizances must be entered into within twenty-one days. By s. 50 of the Metropolitan Police Courts Act, 1839, even more stringent conditions are imposed. None of these conditions was complied with, and *Ex parte Ashton* (1), and *The Queen* v. *Glamorgan Justices* (2), show how strict the compliance with these conditions must be, while ss. 3 and 9 of the Quarter Sessions Act, 1849, also support the view that, in the absence of any express power to give leave to waive the conditions, quarter sessions have no power to do so. I express no opinion on the

(1) 76 J. P. 383.

(2) 24 Q. B. D. 675.

further question which was dealt with in argument whether there is any right to appeal against conviction where the appellant has pleaded guilty.

The first point is one of difficulty. No authority has been cited that on an appeal to quarter sessions against sentence where the facts are gone into without strict proof and no objection is taken by counsel for the appellant, the appellant can thereafter contend that he is not bound by the proceedings. It is said to be the general practice at quarter sessions in the city of London, and it is certainly the practice in the High Court, that the same strictness of proof is not demanded in matters relevant to sentence as in matters relevant to conviction. It is true that an appeal to quarter sessions has always been treated as a rehearing, although there appears to be no statutory provision to that effect: *Rex* v. *The Inhabitants of Newbury* (1). This practice must, I think, have its origin in criminal cases in the presumption of innocence which in appeals to quarter sessions is continued even to a convicted man, but this presumption and the onus on the prosecution which results from it does not, in my opinion, apply to matters of sentence. On the charge itself innocence is then impossible, and guilt on previous occasions becomes for the first time relevant. There is, accordingly, no onus on the prosecution to prove anything, though it is convenient, as was done in this case, that the prosecution should inform the court of matters which may be relevant on sentence, which matters by their plea of guilty the appellants must be taken to have admitted. Sentence is the concern of the court and not of the prosecution, and it is the universal practice in the High Court, so far as my experience goes, for the court to accept admissions by counsel for convicted persons on matters relating to sentence, though no admission by counsel should be accepted before conviction: see *Rex* v. *Standing* (2), and *Rex* v. *Mason* (3). In my opinion, therefore, an appeal against sentence stands on a different footing from an appeal against conviction, and if, as here, an appeal against sentence is allowed by counsel for the appellant to proceed on the basis of the evidence in the court below, the appellant cannot thereafter be heard to say that for that reason alone the sentence imposed cannot stand.

On the third question, I am of opinion that the appeal

(1) (1791) 4 Term. R. 475.

(2) (1909) 2 Cr. App. R. 5.

(3) (1919) 14 Cr. App. R. 126.

committee are right and that, assuming the facts stated in the case to be in evidence, the committee were entitled to confirm a fine of three times the sum which the first appellants paid for the goods in question. The fact that the appellants paid the sum of 750*l*. for the goods is prima facie evidence that they might be expected to fetch that sum if they had been lawfully sold. Wherever a sale attracts purchase tax, that tax presumably affects the price which the seller who is liable to pay the tax demands, but it does not cease to be the price which the buyer has to pay even if the price is expressed as X plus purchase tax. For these reasons, in my opinion the appeal ought to be dismissed with costs.

LEWIS J. I agree.

WROTTESLEY J. I have had an opportunity of seeing the judgment which has just been delivered, and I agree with it.

Appeal dismissed.

Solicitor for appellants: *W. G. R. Saunders & Son.*
Solicitor for respondent: *Solicitor to the Board of Trade.*

P. B. D.

EVERALL *v.* BARNWELL.

1944
Jan. 12, 24.

Emergency legislation—Motor car—Fuel—Unlawful use—Purpose not specified in current application—Purpose in application for immediately preceding period deemed to have been mentioned in current application—Control of Motor Fuel Order, 1942 (*St. R. & O.* 1942, *No.* 2400), *art* 5 (2.)

An application was made for a supply of coupons to purchase motor fuel for use in a motor car for the period, September, October and November, for certain purposes which did not include sporting purposes, and a similar application for the same purposes was made for the following period of December, January and February. Both applications were granted but not for the number of coupons for which application was made. On September 16, during the first period, an application was made for a supply of these coupons for sporting purposes for the months of October and November during the first period and for December and January during the second period, and on October 1 a supply was granted, but only for October and November during the first period. All the coupons for the supply of motor fuel for sporting purposes were surrendered before November 30 and the applicant filled the petrol tank of his car with this motor fuel and after November 30 continued to use his car for sporting as well as other purposes. By the concluding words of art. 5 (2.) of the Control of Motor Fuel Order, 1942 : " a purpose mentioned in an application " in respect of a period immediately preceding the period of " a current application shall be deemed to have been mentioned " in the current application " :—

Held, that " sporting purposes " must be deemed to have been mentioned in the current application for the period December, January and February, and, therefore, the car had not been used otherwise than for the purposes mentioned in that application.

CASE stated by Salop justices.

At a court of summary jurisdiction for the petty sessional division of Albrighton, sitting at Shrewsbury on March 30, 1943, an information was preferred by the respondent under the Control of Motor Fuel Order, 1942, art. 5 (1.) (1) against the appellant, for that he did unlawfully use motor fuel against the surrender of coupons, for a purpose other than that specified in an application in respect of which the coupons were issued.

The facts proved were that on January 21, 1943, the appellant used his 12-horse-power Wolseley motor car for sporting purposes. By an application dated August 4, 1942, the appellant applied for a supply of coupons entitling him to purchase motor fuel for use in his motor car for the period ending November 30, 1942. He mentioned six purposes for which the petrol was wanted which did not include sporting purposes. On September 16, he made a further application for coupons to purchase motor fuel for use in his motor car

(1) By the Control of Motor Fuel Order, 1942, article 5 :— (1) " Subject to the provisions of " article 13 of this order no " person shall, except under the " authority of a licence, use or " permit the use of motor fuel in " a motor vehicle, coupons in " relation to which are issued by " the Minister of War Transport " on behalf of the Minister, other- " wise than for the purposes " mentioned in a current applica- " tion and not disallowed. (2) For " the purposes of this article : (a) " the expression 'current applica- " ' tion ' means an application, in " respect of a period current at " the date of user, upon which " coupons were issued authorising " the supply of motor fuel for " consumption in the vehicle ; " and a purpose mentioned in an " application in respect of a period " immediately preceding the " period of a current application " shall be deemed to have been " mentioned in the current appli- " cation . . . ."

for the period October, November, December, 1942, and January, 1943, asking for three gallons a month for sporting purposes. On October 1, the appellant was granted coupons for nine gallons for sporting purposes but only for the current rationing period ending on November 30. On November 4, the appellant applied for a supply of coupons entitling him to purchase motor fuel for use in his motor car for the next current rationing period, December, 1942, and January and February, 1943, for the same purposes as those mentioned in the application of August 4, 1942, which did not include sporting purposes. Before November 30, 1942, the appellant had obtained motor fuel against the surrender of all coupons supplied to him for sporting purposes and he filled the tank of his motor car therewith. From November 30, 1942, to the date of the alleged offence the appellant continued to use his motor car for sporting as well as other purposes and stated that he had consumed no more than three and a half gallons of petrol on sporting purposes out of the nine gallons allotted to him. The justices held that there had been a breach of the order, convicted the appellant, fined him 3*l*. and ordered him to pay 10*s*. 6*d*. costs, but stated this case.

F. H. Lawton for the appellant. "Sporting purposes," mentioned in the application of September 16, 1942, are to be deemed to have been mentioned in the current application of November 4, 1942, for the period December, 1942, and January and February, 1943. The object of the last words of art. 5 (2.) of the Motor Fuel Order, 1942, would seem to be to permit the use of petrol still in the tank at the end of a period for the purposes for which it had been obtained.

S. L. Elborne for respondent. The words in art. 5 (2.): "an application in respect of a period immediately preceding "the period of a current application" means an application in respect of the total preceding period, in this case the application of August 4, 1942, for the period September, October and November, 1942. The application made on September 16, 1942, and granted on October 1, 1942, for the two months October and November, 1942, was a special application for a special purpose for a part of the preceding period and is not covered by the concluding words of art. 5 (2.) The appellant acted in breach of art. 3 (*a*) of the order in that he used coupons for a purpose other than that to which the coupons related, since it is found in the case that from November 30 the appellant used his motor for other purposes as well as for sporting purposes. See art. 20 as to the delivery up of coupons not surrendered to a supplier. The allocation of motor fuel is not on mileage but on coupons for the purpose specified.

Counsel was not called on to reply.

Cur. adv. vult.

Jan. 24. ATKINSON J., read the judgment of the court (HUMPHREYS, ATKINSON and CASSELS JJ.). Article 5 (2.) of the Control of Motor Fuel Order, 1942, provides that :—" For " the purposes of this article the expression ' current " ' application ' means an application in respect of a period " current at the date of user upon which coupons were issued " authorizing the supply of motor fuel for consumption in the " vehicle." If the definition had stopped there, the case for the prosecution would have been clear, but it continued: " and a purpose mentioned in an application in respect of " a period immediately preceding the period of a current " application shall be deemed to have been mentioned in the " current application." Indisputably " sporting purposes " were mentioned in an application in respect of the period immediately preceding the December-February period. They must, therefore, be deemed to have been mentioned in the current application dated November 4, 1942. If they had been expressly mentioned there would have been no offence committed and if they are to be deemed to have been mentioned, the position is the same. It was, of course, impossible for the appellant to earmark any particular gallon of motor fuel for any one purpose and the object of the last words of art. 5 (2.) seem to be to permit the user of petrol still in the tank at the end of a period for the purposes for which it had been obtained. The appeal must be allowed and the conviction quashed.

Appeal allowed.

Solicitors for appellant: *Tamplin, Joseph and Flux, for Sprott, Stokes and Turnbull, Shrewsbury.*

Solicitors for respondent: *Piesse and Sons, for B. D. J. Hayes, Shrewsbury.*

C. G. M.

MILLER *v.* WILLIAM BOOTHMAN & SONS, LIMITED.

C. A.

1944
Jan. 12, 19.

Factory Acts—Dangerous machinery—Fencing—Circular saw—Modification of Act by regulations—Factories Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 67), *s.* 14, *sub-s.* 1; *s.* 60, *sub-ss.* 1, 2 (*c*); *s.* 159, *sub-s.* 1—*Woodworking Machinery Regulations,* 1922 (*St. R. & O.* 1922, *No.* 1196), *reg.* 10.

Section 14, sub-s. 1, of the Factories Act, 1937, enacts that: "Every dangerous part of any machinery . . . . shall be securely "fenced." Regulation 10 of the Woodworking Machinery Regulations, 1922, prescribes a certain form of fencing for circular saws. The plaintiff was injured in operating a circular saw belonging to his employers, the defendants. The fencing of the saw did not comply with the sub-section, but did comply with the regulation:—

Held, that the regulation, which, by s. 159 of the Act of 1937, was to be deemed to be made under that Act, modified s. 14, sub-s. 1, and, accordingly, that the defendants had not committed a breach of a statutory obligation, and were not liable to the plaintiff.

Statement by Salter J., in *Davies* v. *Owen* [1919] 2 K. B. 39, 41, approved with qualification.

Lewis v. *Denyé* [1938] 2 All E. R. 813 (on this point), and *Whitten* v. *Army and Navy Stores, Ld.* [1943] K. B. 580, overruled.

APPEAL from Stable J.

The plaintiff claimed damages from the defendants for personal injuries sustained in consequence of an alleged breach by them of their statutory duty, under s. 14 of the Factories Act, 1937 (1), securely to fence a dangerous part of machinery, namely, a circular saw. The saw was fitted with a guard of the best standard pattern in existence which complied with reg. 10 of the Woodworking Machinery

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(1) Factories Act, 1937, s. 14, sub-s. 1: "Every dangerous part "of any machinery . . . . shall "be securely fenced . . . . Provided that, in so far as the "safety of a dangerous part of any "machinery cannot by reason of "the nature of the operation be "secured by means of a fixed "guard, the requirements of this "subsection shall be deemed to "have been complied with if a "device is provided which automatically prevents the operator "from coming into contact with "that part."

Woodworking Machinery Regulations, 1922, reg. 10 (c): "The top "of the saw shall be covered by "a strong and easily adjustable "guard, with a flange at the side "of the saw farthest from the "fence. The guard shall be kept "so adjusted that the said "flange shall extend below the "roots of the teeth of the saw. "The guard shall extend from the "top of the riving knife to a point "as low as practicable at the "cutting edge of the saw."

C. A.
1944

Miller v. William Boothman & Sons, Ld.

Regulations, 1922, but, of necessity, part of the cutting edge of the saw was exposed when in use. By s. 159 of the Act, the regulations of 1922 are deemed to have been made under the Act of 1937. The defendants contended that reg. 10 modified s. 14, sub-s. 1, of the Act, and that, as it was admitted that they had complied with that regulation, they had not committed any breach of a statutory duty. Stable J. gave judgment for the defendants. The plaintiff appealed.

Henry Burton (*Alexander Karmel* with him), for the plaintiff. Section 14, sub-s. 1, of the Act of 1937 is absolute in its terms and must be complied with even though compliance would render the machine in question commercially unusable: *Davies* v. *Owen*, per Salter J. (1). The obligation contained in s. 14, sub-s. 1, is not modified by the Woodworking Machinery Regulations, 1922: *Lewis* v. *Denye* (2), per Tucker J. at assizes, and per Wrottesley J. in *Whitten* v. *Army and Navy Stores, Ld.* (3), both cases dealing with circular saws. The regulations do not modify theAct as it is not enacted therein that they shall have the force of a statute. Regulations only carry out in details the enactments of a statute. Nor is sub-s. 1 of s. 14 modified by the proviso to the sub-section, which, indeed, adds a further precaution. It follows that the defendants committed a breach of their statutory duty.

Rowson for the defendants. In *Davies* v. *Owen* (1) there were no regulations which could be said to modify the Act. Here the regulations obviously modify the Act, and as the defendants admittedly complied with those regulations, they committed no breach of statutory duty.

Cur. adv. vult.

Jan. 19. The judgment of the court (Scott, Luxmoore and Goddard L.JJ.) was read by Goddard L.J. The action out of which this appeal by the plaintiff arises was brought by him to recover damages for personal injuries sustained in consequence of an alleged breach of statutory duty by the defendants, who were his employers. The breach complained of was the alleged failure securely to fence a dangerous machine, namely, a circular saw, contrary to s. 14, sub-s. 1, of the Factories Act, 1937. The facts, except as to

(1) [1919] 2 K. B. 39, 41.
(2) [1938] 2 All E. R. 813.
(3) [1943] K. B. 580.

C. A.

1944

Miller
v.
William
Boothman
& Sons,
Ld.

contributory negligence on the part of the plaintiff, were not in dispute. Stable J. found there was no contributory negligence on the part of the plaintiff, and, there being no appeal from that finding, we need say no more about it.

Mr. Burton, for the plaintiff, submitted that s. 14 imposes an absolute obligation to fence securely, and that it is no answer to say that, if it were so fenced, the machine could not be used. He relies on the decision of Salter J. in *Davies* v. *Owen* (1), under s. 10 of the Factory and Workshop Act, 1901, with which s. 14, sub-s. 1, of the Act of 1937 is practically identical, that, if a machine cannot be securely fenced while remaining commercially practicable or mechanically useful, the statute in effect prohibits its use. For reasons which will appear later it is of importance to notice that the machine with which that case was concerned was not a circular saw or one to which any particular regulations made under the Act applied, but in *Lewis* v. *Denyé* (2), Tucker J. at assizes, held that s. 14 applied to a circular saw, holding, as we understand his judgment, that the section imposed an absolute obligation to which there were no exceptions. However, he also held in that case that there was contributory negligence, and when that judgment was appealed both to this court (3) and the House of Lords (4), it was only on the question of contributory negligence. In the House of Lords Viscount Simon L.C. expressly reserved his opinion (5) on the passage in *Davies* v. *Owen* (1), to which we have referred, and the other noble and learned Lords expressed no opinion on it. It is necessary for us, therefore, to consider whether the obligation imposed by s. 14 is absolute, or whether, though it may be prima facie absolute, there may not be some exceptions provided by the Act.

If s. 14, sub-s. 1, stood alone, in our opinion, the obligation would be absolute. The section itself does not admit of exceptions. It does not say that a dangerous machine is to be fenced as securely as possible or only so far as will leave it commercially or mechanically useful. A dangerous machine must be securely fenced, but, if a fixed guard cannot be provided because of the nature of the operation, a device may be provided which automatically prevents the operator coming into contact with the dangerous part of the machine, and such a device will satisfy the sub-section. The proviso to sub-s. 1, however, does not, in our opinion, create an exception. It provides for an additional precaution. The object of the section is to secure safety, not merely to provide an injured workman with a cause of action. Prevention is better than cure, and so the Secretary of State is given power to direct the use of a particular sort of guard or device, if he thinks it desirable so to do, to eliminate, so far as is humanly possible, the risk of an accident. In other words, he may say to the owner: "You shall not only fence, but you shall use a "particular sort of fence."

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(1) [1919] 2 K. B. 39, 41.
(2) [1938] 2 All E. R. 813.
(3) [1939] 1 K. B. 540.
(4) [1940] A. C. 921.
(5) Ibid. 932.

Section 14, however, is not the only section which deals with the matter. Section 60 provides, quoting only the material words, that where the Secretary of State is satisfied that any machinery used in factories is of such a nature as to cause risk of bodily injury to persons employed in connexion therewith, he may, subject to the provisions of the Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case, and by sub-s. 2 (*c*), such special regulations may, among other things, modify or extend with respect to any class or description of factory any provisions of part II. of the Act (which includes s. 14), imposing requirements as to safety. So a power to modify is expressly conferred. Section 14, sub-s. 1, of the Act of 1937 reproduces in substance s. 10, sub-s. 1 (*c*), of the Factory and Workshop Act, 1901, though sub-s. 2 is a new provision. Section 60 in substance re-enacts ss. 79, 82, sub-s. 1, and 83 of the earlier Act. The object of the legislature in giving power to the Secretary of State to modify the provisions of the Act in respect of safety requirements would seem to be that it was recognized that there are some machines necessary for modern industry that cannot be completely fenced if they are to be used, and circular and band saws afford good illustrations. From the evidence in the present case it seems that, at any rate down to the date of the trial, no guard had been invented which would afford completely secure fencing for these saws. Some part of the cutting edge must be exposed or the wood could not be cut. Accordingly, if the prohibition of s. 14 is absolute the use of these saws in a factory inevitably renders the owners liable to penalties, and it must follow that they cannot be used at all. It is unnecessary to emphasize the seriousness of such a result. It was, in our opinion, for this very reason that in 1922 the Secretary of State made the Woodworking Machinery Regulations. These regulations were made under the Act of 1901,

C. A.

1944

MILLER
v.
WILLIAM
BOOTHMAN
& SONS,
LD.

ss. 79, 82 and 83 being the relevant sections. By s. 159 of the Act of 1937 these regulations continue in force, notwithstanding the repeal of the earlier Act, and have effect as though made under the present Act, that is, under s. 60. They contain detailed provisions in reg. 10 for the guarding of circular saws, hand saws and planing machines. In our opinion, these regulations must be regarded as modifying the provisions of s. 14 in respect of these machines and of substituting the prescribed guarding and fencing for the absolutely secure fencing which the section would otherwise require. It is difficult, indeed, to see what other object these regulations could have. They clearly contemplate the use of these saws. If saws are securely fenced as required by s. 14 they could not be dangerous to life or limb, and, indeed, could not be used at all. The use in s. 60, sub-s. 1, of the words " as appear to " him to be reasonably practicable and to meet the necessity " of the case " we think clearly shows that it is intended to give the Secretary of State power to modify the otherwise absolute obligation so as to allow the use of the machine, provided that reasonable, though not absolute, provision for safety is made. These regulations are, in our opinion, undoubtedly intra vires the Secretary of State under the Act, and, if their object and result be not what we have said, they would, indeed, be little better than a trap for factory owners. To any one reading them it could not but appear that, provided he followed the provisions of the regulations and saw that his saws were constructed and protected in accordance therewith, he was fulfilling his duties under the Act.

Turning again to the authorities, it follows from what we have said that, in our opinion, *Davies* v. *Owen* (1) was rightly decided, and that, as a general proposition, we agree with the passage in Salter J.'s judgment to which we have already referred. It should, however, be qualified by saying that the statute prohibits the use of a dangerous machine which cannot be securely fenced unless it is one which is subject to special regulations, and is used and constructed in accordance therewith. We are of opinion that so much of Tucker J.'s judgment in *Lewis* v. *Denyé* (2) as holds that reg. 10 of the regulations does not affect the absolute obligation otherwise imposed by s. 10 of the Act of 1901, now s. 14 of the present Act, must be overruled and so must the judgment of Wrottesley J. in *Whitten* v. *Army and Navy Stores* (3), on this point.

(1) [1919] 2 K. B. 39, 41.
(2) [1938] 2 All. E. R. 813.
(3) [1943] K. B. 580.

As it was not disputed that the saw in the present case complied with the regulations, it follows that there was no breach of statutory duty on the part of the defendants, and that, accordingly, the appeal fails, but, though agreeing with the learned judge in the result, we do not agree with the reason that he gave. He construed the words securely fenced " in relation " to the degree of risk the particular machine involved." By this we think he must have been taking into consideration the commercial or mechanical use of the machine, and, in effect, held that, if all that was left unfenced was what was sufficient to enable the machine to be worked, that was enough to comply with the Act. If that is what he meant, we cannot agree with him. Our decision is based entirely on the ground that s. 60 permits of a modification of the absolute obligation under s. 14, and that the Woodworking Machinery Regulations, 1922, have modified it. The appeal is dismissed with costs.

Solicitors for plaintiff: *Sheffield, Powell & Scott Tucker, for Henry Backhouse & Son, Blackburn.*

Solicitors for defendants: *William Hurd & Son.*

W. L. L. B.

1944
Jan. 14, 17.

CONCENTRATED FOODS, LIMITED *v.* CHAMP.

Food and drugs — Penalty — " Subsequent offence " — Limitation of time for proceedings—Sale by retailer—Proceedings against manufacturer —Other offences by manufacturer between sale by him and sale by retailer—Misleading label—Evidence—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 79; *s.* 80, *sub-s.* 1; *s.* 83, *sub-s.* 3.

Under s. 83, sub-s. 3, of the Food and Drugs Act, 1938, where it appears to the authority concerned that an offence which has been committed under the Act by a retailer was due to an act or default by the manufacturer of the article in question, the authority may cause proceedings to be taken against the manufacturer without first taking proceedings against the retailer. In such proceedings, the manufacturer may be convicted of the offence with which the retailer might have been charged.

The date from which the time limit within which proceedings must be brought under s. 80 of the Act is the date of the offence with which the retailer might have been charged and of which the manufacturer has been convicted. If, before that date, the manufacturer has been convicted of like offences under the Act he may be dealt with as for a "subsequent offence" under s. 79, and a heavier penalty imposed.

British Doughnut Co., Ld. v. *Dale* (ante p. 228) followed.

Per *Wrottesley J.* The question whether a label is objectionable or not, in the sense of whether or not it offends against the Act, is a matter, not for any expert witness, but for the court. The true test is not whether the chemist is misled, but whether the ordinary man is misled.

CASE stated by justices.

At a court of summary jurisdiction held at Maidenhead, Berkshire, on October 13, 1942, an information, laid on September 26, 1942, was preferred against the appellants, Concentrated Foods Ld., that they on September 4, 1942, at Cookham, gave with an article of food described as "orangette," then sold by a retailer to the respondent, an inspector under the Food and Drugs Act, a label which was calculated to mislead the purchaser as to the nature, substance and quality of the food, contrary to s. 6, sub-s. 1, of the Food and Drugs Act, 1938. The label was as follows: "Concentrated Cordial Essence. Orangette. The contents of "this bottle will make four pints of a refreshing drink. Just "add one quarter of the essence to each pint of water: "a teaspoonful to a glass of water." The bottle of "orangette" in question had been manufactured by the appellants, who, on May 27, 1941, supplied it to a firm of wholesale grocers, it being sold by the latter to the retailer on June 4, 1941. The Berkshire county council, in the exercise of their powers and discretion under s. 83, sub-s. 3, of the Food and Drugs Act, 1938 (1), took proceedings against the manufacturers of the food instead of against the retailer.

At the hearing of the information evidence was given for the prosecution by Mr. Thomas O. MacLachlan, public analyst for the county of Berkshire and one of the public analysts for the city of Westminster, who stated that, in his opinion, " orangette " was neither concentrated, nor a cordial, nor an essence, and the label was calculated to mislead because (*a*) the preparation contained phosphoric acid instead of citric or tartaric acid ; (*b*) the amount of essential oil of orange was too small to determine ; and (*c*) if the contents of the bottle were diluted according to the instructions, it would give a concentration equivalent to only one-sixth of that of natural orange juice. For the appellants Mr. Edwards, also one of the public analysts for the city of Westminster and public analyst for the borough of Kensington, stated that the label in question had before use been submitted to him for his approval. In his opinion, the label was unobjectionable. He considered that the preparation would make a refreshing drink. The phospho-citric acid used in the manufacture of " orangette " was also used in the preparation of a lemonade mineral water by a well-known firm.

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(1) Food and Drugs Act, 1938, s. 83, sub-s. 3: "Where it appears "to the authority concerned that "an offence has been committed "in respect of which proceedings "might be taken under this Act "against some person and the "authority are reasonably satisfied that the offence of which "complaint is made was due to an "act or default of some other "person, and that the first-mentioned person could establish "a defence under sub-section (1) "of this section, they may cause "proceedings to be taken against "that other person without first "causing proceedings to be taken "against the first-mentioned person. In any such proceedings "the defendant may be charged "with and, on proof that the "contravention was due to his "act or default, be convicted of, "the offence with which the first-mentioned person might have "been charged."

The justices convicted the appellants. They found that the preparation was not a concentrated cordial essence, that the label was calculated to mislead as to its nature, substance and quality, and that the contravention of the statute was due to the act or default of the appellants, who had failed to prove that they did not know, and could not with reasonable diligence have ascertained, that the label was calculated to mislead. During the hearing it had been proved or admitted that between August, 1941, and June, 1942, the appellants had been convicted of a number of similar offences in connexion with the sale of other preparations, and the justices, therefore, treated the present case as a " subsequent offence," within the meaning of s. 79 of the Act, and ordered the appellants to pay a fine of 35*l*. and 15*l*. 15*s*. costs. The appellants appealed.

Harvey Moore for the appellants. This prosecution was out of time. By s. 80, sub-s. 1, of the Act prosecutions may be commenced under the Summary Jurisdiction Acts, under which the limit of time is six months : see s. 11 of the Summary Jurisdiction Act, 1849. The offence committed by the appellants was committed on May, 1941, and, if they had been prosecuted directly for that offence, the prosecution would have been out of time. The legislature has provided specifically

1944

CONCENTRATED FOODS, LD. v. CHAMP.

a limit of the time in which to bring proceedings for an offence, and the courts will not allow the intention of the legislature to be by-passed by an action brought under s. 83, sub-s. 3. There must be some reasonable limit of time in such a case as the present, otherwise, if a bottle from the consignment in question were sold by a retailer fifty years hence, the manufacturers could still be held liable for the offence then committed. For the same reasons, this was not a "subsequent "offence" within s. 79. The only act or default of the appellants occurred in May, 1941, and the other offences committed by them were all after, and not before, that date. Section 83, sub-s. 3, while making the appellants liable for the sale by the retailer, does not import that they are to be treated as the sellers. [*Rex* v. *South Shields Licensing Justices* (1) and *Collins Arden Products Ld.* v. *Barking Corporation* (2) were referred to.]

R. C. Hutton for the respondent. These proceedings were in time within s. 80, sub-s. 1, of the Act of 1938. Where an informatoin is laid against the manufacturer instead of against the retailer, the offence charged is that committed by the retailer, in this case on September 4, 1942. The information was laid on September 26 and was, therefore, within the twenty-eight days fixed by proviso (*a*) to sub-s. 1 of s. 80, in cases where a sample of the article sold has been procured. The appellants having been convicted of the offence committed by the retailer on September 4, 1942, and not of the offence committed by themselves in May, 1941, it follows that this was an offence committed subsequently to the other convictions proved at the trial, and, therefore, was properly treated as a subsequent offence within the meaning of s. 79: see *British Doughnut Co., Ld.* v. *Dale* (3). The justices were at liberty to find on the evidence before them that the appellants had not discharged the onus of proving that they did not know, and could not with reasonbale diligence have ascertained, that the label was of such a character as to mislead the purchaser.

LAWRENCE J. Three points have been argued before us. The first is whether the justices could reasonably find, as they have found, that the appellants had not discharged the onus

(1) [1911] 2 K. B. 1, 8.

(2) [1943] K. B. 419.

(3) Ante p. 228.

of proving that they "did not know, and could not with "reasonable diligence have ascertained, that the label was of "such a character as" to be calculated to mislead. The contention put before us by the appellants is that, as they had taken the opinion of Mr. Edwards, a public analyst, before they used the label, it was not open to the justices to find that they had not discharged the onus which rested on them of showing under s. 6 that they did not know, and could not with reasonable diligence have ascertained, that the label was of a character calculated to mislead. The justices state in the case: "No person from the appellant company was "called to give evidence before us . . . . We preferred the "evidence of the said MacLachlan to that of the said Edwards "where such evidence conflicted . . . . Notwithstanding the "opinions expressed by the said Edwards and [certain] "letters . . . . we came to the conclusion, from hearing the "evidence of all the witnesses and the actual label which was "produced, that anyone having knowledge of the contents "of the bottle in question could have had no doubt that the "label was calculated to mislead. We found that the said "'Orangette' was not a concentrated cordial essence and "that the label thereon was calculated to mislead as to the "nature, substance and quality thereof, and that this contravention was due to the act or default of the appellant "company, and that the appellants had not proved that they "did not know and could not with reasonable diligence have "ascertained that the label was calculated to mislead." It is evident, therefore, that the justices addressed their minds to the two questions of fact which were before them. Firstly, they held on the evidence before them, that the label was calculated to mislead, and, secondly, they came to the conclusion that the appellants had not discharged the onus of proof which rested on them. They were not satisfied that the evidence of one public analyst was conclusive on this issue, and they point out that no witness from the appellant company was called who could have told them what the appellants knew and what steps they took to ascertain whether or not the label was misleading. The justices saw Mr. Edwards in the box, and they did not accept his evidence. It appears, therefore, that there was ample evidence on which they could find as a fact that the appellants had not discharged the onus which rested on them under s. 6.

The next question is whether the prosecution was out of time. It is argued on behalf of the appellants that there was a statutory limitation for the institution of these proceedings either of six months or of twelve months according to whether or not the offence is that of giving a warranty. On the other hand, Mr. Hutton, for the respondent, says that the true limitation which is laid down by the statute is one of twenty-eight days. The same point, however, appears to me to arise whatever the limitation is, because, this prosecution having taken place on September 4, 1942, and the appellants having supplied the orangette with its label on May 27, 1941, it is clear that, if the true date to be considered is the date on which the appellants supplied the label, the prosecution is out of time on any view of the actual period of limitation. The matter really turns on s. 83, sub-s. 3, of the Act of 1938, under which it is open to the prosecution to prosecute, not the retailer, but his supplier, if the complaint, in their opinion, is due to the act or default of the supplier. The words of s. 83 (3) are as follows : " Where it appears to the authority concerned that an " offence has been committed in respect of which proceedings " might be taken under this Act against some person and the " authority are reasonably satisfied that the offence of which " complaint is made was due to an act or default of some other " person and that the first-mentioned person could establish " a defence under sub-s. 1 of this section, they may cause " proceedings to be taken against that other person without " first causing proceedings to be taken against the first-" mentioned person. In any such proceedings the defendant " may be charged with and, on proof that the contravention " was due to his act or default, be convicted of, the offence " with which the first-mentioned person might have been " charged." It is common ground here that " the first-" mentioned person " was the retailer, and the " other " person " was the appellants, and the justices have found that the offence was due to the act or default of the appellants, whom they have convicted. In those circumstances, according to the words of the last part of that sub-section, " the " defendant "—that is the appellants—" may be charged with " and, on proof that the contravention was due to his act or " default, be convicted of, the offence with which the first-" mentioned person "—the retailer—" might have been " charged." The offence with which the retailer might have been charged was committed on September 4, 1942, and the prosecution was undoubtedly brought within twenty-eight days of that offence. The very words of s. 83, sub-s. 3, make it clear that the offence with which the appellants were charged was an offence which was committed on September 4, 1942, and was not the offence which they committed on May 27, 1941.

The last point is that it was illegal to impose a fine of more than 20*l*. because, although the appellants had been convicted of a number of offences under the Act, all of them had taken place after May 27, 1941, so that the present offence could not be a subsequent offence within the meaning of s. 79 of the Act of 1938. This point has already been disposed of by a Divisional Court in *British Doughnut Co., Ld.* v. *Dale* (1). which would be binding on us, but, in any event, as I have said, the offence of which the appellants have been found guilty was that with which the retailer might have been charged, namely, an offence committed on September 4, 1942, and that date was after the various convictions of the appellants which are referred to in the case. We were referred to a case under the Licensing Act, *Rex* v. *South Shields Licensing Justices* (2), but, in my view, that is clearly distinguishable from the present matter because the Licensing Act contains no such provision as s. 83 of the Food and Drugs Act, 1938.

For all these reasons I am of opinion that the appeal should be dismissed.

LEWIS J. I agree with the conclusions and the reasons of my lord in the judgment he has just delivered. I should like, however, to say two things. One is, that it is frequently forgotten that in cases of appeal by way of case stated this court cannot criticize and reverse a finding of fact of the justices. The case only comes to this court on a question of law, and where the justices have directed their minds to the proper question—as I am satisfied they did in this case—and there is evidence on which they could find the facts which they have found, this court has no power to reverse their decision unless they have drawn a wrong conclusion in law on the facts found.

The other observation I would make is with regard to the case which Mr. Moore cited to us and on which he placed some reliance, namely, *Collins Arden Products Ld.* v. *Barking Corporation* (3). That was a decision of a Divisional Court,

(1) Ante p. 228.

(2) [1911] 2 K. B. 8.

(3) [1943] K. B. 419.

and it is not surprising to find that that court reversed the decision of the justices on a point of law. The head note reads as follows: "Where a person is charged under s. 3, sub-s. 1, of the Food and Drugs Act, 1938, with selling 'to "'the prejudice of the purchaser' any food which is not of "the nature, substance or quality of the food demanded, it "is not sufficient, to justify a conviction, that an expert "witness such as a public analyst should express the opinion "that the article in question should contain a certain "ingredient. Evidence must be forthcoming that when "a member of the general public asks for the food he means, "and means only, an article containing an ingredient which is "absent in the food in respect of which the charge is brought." I cannot conceive of anybody quarrelling with that decision. Section 3, sub-s. 1, of the Food and Drugs Act, 1938, reads as follows: "If any person sells to the prejudice of the "purchaser any food or drug which is not of the nature, or "not of the substance, or not of the quality, of the food or "drug demanded by the purchaser, he shall . . . . be guilty "of an offence." It is true that in that case there were two charges brought, one under s. 3, sub-s. 1, and one under s. 6, sub-s. 1, the section under which the present case was brought. The justices did not deal with the charge under s. 6. They said: "A majority of the justices were of opinion that 'the "'preparation was a palatable and harmless beverage, but "'that in the absence of any ingredient of a tonic, invigorating, "'restorative, energizing or warming quality, the term "'"cordial" was a misdescription'." The Divisional Court pointed out that it does not follow at all that because the evidence was of that description, what was sold in that particular case was what the purchaser demanded. As I read it, that was all that that case decided. The justices never dealt properly, or, indeed, at all, with the charge under s. 6, and Hallett J., said: "If it appeared from the case that the "justices had directed their minds to the right question, and, "so directing their minds, had found facts which justified "their determination, I should not have thought it right "that this court should interfere, but, having perused the "case, I am not satisfied on either of those points. Under "s. 6, sub-s. 1, a person commits an offence who sells food "with a label which is calculated to mislead 'unless he "'proves that he did not know, and could not with reasonable "'diligence have ascertained, that the label was of such

" ' a character as aforesaid ' ; that is to say, that it was misleading. It is plain that the appellants relied on the defence " that, even if they had sold this preparation with a misleading " label, they did not know, and could not with reasonable " diligence have ascertained, that the label was misleading. " They adduced evidence of a formidable character in support " of that defence, yet one finds that the justices never addressed " their minds to that defence. There is no determination on " it, and no reference to it in the case." That was why it is not surprising to find that the Divisional Court came to the conclusion to which they did. In my view, that case has no application at all to the present matter.

WROTTESLEY J. I agree. I notice that considerable argument was based on some evidence which, contrary to the usual practice, found its way into this case—the evidence of a public analyst, who is said to have been consulted by the appellants, and to have told them that the contents of the label were unobjectionable. It was, therefore, argued that the appellants had exercised the " reasonable diligence " referred to in s. 6. That evidence, having regard to the nature of this label, which used words with which we are all familiar, seems to be both irrelevant and inadmissible in any case in examination-in-chief. The question whether the label offended against the Act was a matter, not for any expert witness, but for the court. This kind of argument is, in my judgment, founded on a misconception of the true scope and function of expert witnesses. In these cases experts are there to inform the court of the composition of the subject-matter of the charge. In addition they are, like all expert witnesses, entitled, if asked, to give their opinion based on their examination of the subject-matter, provided it is within the scope of their special knowledge. The question whether a label is calculated to mislead means whether it is calculated to mislead the public, not the qualified chemist, and so it is a question, not for the qualified chemist, but for the court. Manufacturers are very prone to use phrases such as " concentrate," " extract," " essence," " cordial," which may well have a special meaning to the chemist. It is not surprising, therefore, that a chemist should tell the court that an article is not his idea of an essence or an extract, but that is not the test. The test is : What does the ordinary man understand by the language ? Was he misled ? That was pointed out in *Collins Arden Products*

Ld. v. *Barking Corporation* (1), by Stable J., who used the phrase " the ordinary person." Nor is an inquiry of an analyst, such as took place in this case, an exercise of the kind of reasonable diligence referred to in s. 6. Such an inquiry savours too much of the question : " How close can I sail to " the wind without being taken aback ? " That is not the sort of diligence that Parliament had in mind in s. 6, or in the corresponding s. 83. Different considerations would apply if the subject-matter were a drug or some chemical compound the nature of which would not be known to the ordinary person in the street, but that is not the present case. In my view, these justices applied the true meaning of this proviso—that unless the seller proves that he " did not know, " and could not with reasonable diligence have ascertained, " that the label was of such a character as aforesaid "—and I am not surprised at their finding " that anyone having " knowledge of the contents of the bottle in question could " have had no doubt that the label was calculated to mislead." That finding of fact disposes of all the defences.

Appeal dismissed.

Solicitors for appellants : *S. A. Bailey & Co.*

Solicitors for respondent : *Peacock & Goddard, for H. J. C. Neobard, Redhill.*

(1) [1943] K. B. 419.

A. W. G.

1944
Jan. 25.

STRAY *v.* DOCKER.

Landlord and tenant—Rent restriction—Dwelling-house—Furnished letting—Extortionate rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 10 (*as amended by Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 2).

The offence created by s. 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 10, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923, of letting a furnished dwelling-house at an extortionate rent is not constituted solely by the act of letting, but is committed by the landlord, whether he be the original lessor or a person deriving title from him, e.g. an assignee of the reversion, when he charges the extortionate rent, on any day during the currency of the tenancy on which the rent is payable.

1944

STRAY
v.
DOCKER.

On May 24, 1941, D. let a furnished dwelling-house on a quarterly tenancy at a quarterly rent which included payment in respect of the use of the furniture. On June 1, 1943 (when the tenancy was still subsisting), an information was preferred against him under the above-mentioned section as amended. On objection taken that the information was out of time under s. 11 of the Summary Jurisdiction Act, 1848:—

Held, that the six months' limitation prescribed by that section ran from the last quarter day on which the rent was payable and not from the date of the letting, and therefore the information was in time.

CASE stated by Sutton Coldfield justices.

At a court of summary jurisdiction sitting at Sutton Coldfield on June 1, 1943, an information was preferred by the appellant, Sydney Ashton Stray, deputy town clerk for the borough, against the respondent, Frank Leslie Docker (" the " landlord "), for that, on May 24, 1941, he did let and continuously since that date had let, to the tenant, one Alan H. Jones, a dwelling-house, known as " Springfield House," Reddicap Heath Road, in the borough, to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, applied, at a rent which included payment in respect of the use of furniture, and the rent charged yielded to the respondent a profit which, having regard to all the circumstances of the case, was extortionate, contrary to s. 10 of the Increase of Rent and Mortgage Interest (Restrictions), 1920, as amended by the Rent and Mortgage Interest Restrictions Act, 1923, and the Rent and Mortgage Interest Restrictions Act, 1939 (1).

The respondent let the dwelling-house to the tenant on May 24, 1941, on a quarterly tenancy at a quarterly rent which included payment in respect of the use of furniture. The tenancy was still subsisting at the date of the hearing, but on amended terms as from March 17, 1943. The justices were of opinion that, as s. 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended), contained a penal provision, it should be construed strictly, that the word "lets" in the action should be construed as referring only to the act of creating a tenancy, that, therefore, the matter of the information arose on May 24, 1941, when the dwelling-house was let to the tenant, and that, as the information was not laid within six calendar months from May 24, 1941, it was barred by lapse of time under s. 11 of the Summary Jurisdiction Act, 1848. Accordingly, they dismissed the information.

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(1) By Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 10: " Where any " person after the passing of this " Act lets any dwelling-house to " which this Act applies . . . . " at a rent which includes pay- " ment in respect of the use of " furniture, and the rent charged " yields to the lessor a profit " which, having regard to all the " circumstances of the case . . . . " is extortionate, then . . . . the " lessor shall be liable on sum- " mary conviction to a fine not " exceeding one hundred " pounds . . . ."

By Rent and Mortgage Interest Restrictions Act, 1923, s. 10 (2.): " In sections . . . . ten of the " principal Act . . . . the ex- " pression ' landlord ' . . . . shall " . . . . be substituted for the " expression ' lessor.' "

Done for appellant. The offence created by s. 10 is committed whenever a landlord receives an extortionate rent. The verb in the section is "yields," not "will yield," and no offence has been committed under s. 10 until the rent charged "yields" to the landlord such a profit. Compare the wording of s. 9 of the Act of 1920 (as amended). If the decision of the justices were right, no provision has been made for a change of circumstances, so that, if a landlord lets a dwelling-house at a certain rent and more than six months later there is a change of circumstances resulting in the profit for the first time becoming extortionate, no prosecution would lie. Such a change of circumstances might arise where the landlord is a mesne landlord and the rent he pays his superior landlord is reduced, or where there is a general drop in the cost of repairs and other landlord's outgoings. Further, if the justices are right, a landlord who assigned the reversion within a week of the letting is the only person who could be prosecuted, the assignee who obtained the extortionate profit being able to escape. It is clear that the substance of the offence is the taking of the extortionate profit: see *Jones* v. *Johnson* (1), where the information charged the defendant with having committed an offence under s. 10, between August 28 and December 13, 1940. The court is construing legislation intended for the protection of tenants and should give effect to that intention if it can do so without doing violence to the language of the statute. The view contended for obtains support from the facts that, by s. 10, sub.-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923, the expression "landlord" was substituted for the expression "lessor" in s. 10 of the Act of 1920, and that, by s. 12, sub-s. 1 (*f*)

(1) (1942) 86 S. J. 120.

of the Act of 1920, the expression "landlord" includes a person from time to time deriving title under the original landlord such as an assignee of the reversion. This makes it clear that the person liable under s. 10 of the Act of 1920 (as amended) is he who from time to time receives the rent which "yields" the extortionate profit. The opening words of s. 10 put emphasis on the fact of "letting," which is a state of things rather than an act. Compare the definition of "standard "rent" in s. 12, sub-s. 1 (*a*), of the Act of 1920. In the alternative, it may be that s. 10 creates a continuing offence which persists so long as the rent realized yields a profit which, having regard to all the circumstances of the case, is extortionate.

Safford for respondent. The contention of the appellant is not consistent with the language of s. 10 (as amended) which clearly contemplates that while, no doubt, the letting persists, the offence is complete when the landlord "lets." The other conditions which must be proved, that the rent includes payment in respect of the use of the furniture and that the rent charged yields an extortionate profit, are only attributes of the letting. If a landlord lets a dwelling-house within the Acts on a three years' tenancy and for six months the rent he receives does not yield an extortionate profit but then, owing to a change of circumstances, it does, the contention of the appellant is that the landlord is guilty of the offence, apparently during the whole period of the letting, although he has no power to alter the terms of the tenancy. The landlord cannot commit an offence by merely continuing to do what he has done in the past when the rent charged yielded no extortionate profit. The definitions of the expression "landlord" in s. 12, sub-s. 1, of the Act of 1920 do not assist the appellant since they are subject to the words "except where the context otherwise requires." An assignee may be a landlord, but he cannot be the person who lets the house since he has received his assignment of the reversion from that person. The offence under s. 10 is not a continuing offence: *Marshall* v. *Smith* (1) and *Hull* v. *London County Council* (2). In *Jones* v. *Johnson* (3) the only issue was whether the question of a rent yielding an extortionate profit was one of fact or of law.

(1) (1873) L. R. 8 C. P. 416.
(2) [1901] 1 K. B. 580.
(3) 86 S. J. 120.

HUMPHREYS J. The point raised by this case stated is whether, in a prosecution under s. 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended), the six months period of limitation prescribed by s. 11 of the Summary Jurisdiction Act, 1848, runs from the date of the letting of the house or whether it runs from any time at which it can be said that the rent charged yields to the landlord a profit which, having regard to all the circumstances of the case, is extortionate.

It is clear from the language used that s. 10 is intended to prevent the exploitation of poor people by landlords, and, in spite of the section being a penal enactment, the court, in my opinion, must have regard to that fact in interpreting it. The question being what really is the offence so that one can determine when the matter of complaint arose, two separate elements must be taken into consideration. The section prescribes that there must be a letting after a certain date, and it must also be proved that the rent charged, which includes payment in respect of the use of furniture, yields to the landlord a profit which, having regard to all the circumstances of the case, is extortionate. In my view, the real offence created by the section is not the letting of the dwelling-house to which the Act applies, although that must necessarily be an incident in the commission of the offence, but the charging to the tenant of a rent which in all the circumstances yields to the landlord an extortionate profit. If that view is correct, it is obvious that at the time when an extortionate rent is in fact charged—that is, in this case on every quarter day when the rent becomes payable—there is an offence which would come within the meaning of the language in this section.

That was the argument of Mr. Done, and I accept it. His argument is considerably strengthened by the consideration that in s. 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the words were " and the rent charged " yields to the lessor a profit . . . ." As the section then stood " it might be difficult to say that any person who was not the original lessor was liable to be convicted. Apparently, Parliament had brought to its notice that a person who is receiving a rent which yields an extortionate profit is not necessarily the lessor since he may be the assignee of the reversion, and that it was desirable to make such a person liable under s. 10, although he was not the person who had let the dwelling-house. Accordingly, by s. 10, sub-s. 2, of the

Rent and Mortgage Interest Restrictions Act, 1923, the expression "landlord" was substituted for "lessor" in s. 10 of the Act of 1920. This amendment lends force to the argument of Mr. Done that circumstances might well change after the letting of a dwelling-house, so that a rent which has yielded a reasonable profit becomes a rent which yields an extortionate profit. He gave as an instance the case of a mesne landlord who at the time of the letting might be paying so high a rent to his superior landlord as to make it impossible to say that the rent which he charged to the tenant yielded an extortionate profit, but who might find that the rent which he had to pay was lowered substantially, in which case it might be found by a court that the rent which he continued to charge to his tenant yielded him an extortionate profit. Another change of circumstances suggested was that the cost of materials and labour necessary to effect repairs or the amount of other outgoings from the pocket of the landlord might be reduced materially, during the course of the period of the letting. Another section of the Act of 1920 makes it clear almost beyond argument that a landlord who may commit an offence under s. 10, need not be the original lessor but may be quite a different person. By s. 12, sub-s. 1: "For the purposes of this Act, except where the context "otherwise requires :— . . . . (*f*) The expression 'landlord' "includes any person from time to time deriving title under "the original landlord . . . . (*g*) the expression 'landlord' "also includes in relation to any dwelling-house any person "other than the tenant who is or would but for this Act be "entitled to possession of the dwelling-house."

For these reasons, I have come to the conclusion that the contention put forward on behalf of the respondent—that the offence created by s. 10 is complete at the moment of letting—ought not to be accepted. The appeal must be allowed, and the case remitted to the justices to hear and determine on the facts.

ASQUITH J. I agree. At the risk of repetition, I wish to emphasize one point, already made by my Lord, because it seems to me in itself to be conclusive against the contention put forward on behalf of the respondent that the offence under s. 10 consists in and is complete with the letting. It is clear under the section (as amended) that, though there must have been a letting of the dwelling-house by some-one, proceedings can be taken against another person who did not let the dwelling-house. So long as the words of the section were :—" and the rent charged yields to the lessor a profit, which having " regard to all the circumstances of the case is extortionate," the " lessor " meant the person who let the dwelling-house, but it seems to have occurred to the legislature that, if the reversion had been assigned and the rent charged yielded to the assignee a profit which was extortionate, it would be unjust that the assignee should escape. So, by s. 10, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923, " landlord " was substituted for " lessor " in s. 10 of the Act of 1920, and " landlord " was already defined by s. 12, sub-s. 1 (*f*) and (*g*), of the Act of 1920 as including persons deriving title under the original landlord, e.g., an assignee of the reversion. The " landlord " can be prosecuted under s. 10 (as amended) and an assignee of the reversion is a " landlord " within the meaning of the section. It follows that a person can be prosecuted although he has not " let " the dwelling-house. This fact seems to me to be, by itself, fatal to the contention presented on behalf of the respondent.

CASSELS J. I agree. I cannot think that the intention of the legislature as shewn in s. 10 was to make the offence complete at the time of the letting. The side-note to s. 10 of the Act of 1920 is :—" Penalty for excessive charges for " furnished lettings." It is the charging of an extortionate rent which is aimed at. A rent which yields a reasonable profit at the time of the letting may become by a change of circumstances a rent which yields an extortionate profit. If the argument for the respondent were correct, a landlord who charged an extortionate rent for a furnished house for six months after the date of the letting without being prosecuted would no longer be liable to prosecution under s. 10, and would only be liable to proceedings in the county court taken by the tenant to recover the rent in excess of normal profit under s. 9.

Case remitted.

Solicitors for appellant : *Sharpe, Pritchard & Co., for R. Walsh, Town Clerk, Sutton Coldfield.*

Solicitors for respondent : *Stafford Clark & Co., for Jeffery, Wild & Lovatt, Birmingham.*

C. G. M.

1944
Jan. 19;
Feb. 2.

GARVIN *v.* POLICE AUTHORITY FOR CITY OF LONDON.

Police—Pension—" Injury received in execution of duty "—Tuberculosis—Police Pensions Act, 1921 (11 *&* 12 *Geo.* 5, *c.* 31), *s.* 2, *sub-s.* 1 (*c*).

The appellant, a police constable, was on duty during the aerial bombardments from September, 1940, to the middle of 1941, serving twelve hours a day instead of the usual eight hours. During that time he could only take meals at irregular hours and was subjected to constant wettings. The medical evidence showed that these conditions would render him more liable to contract tuberculosis, and in fact tuberculosis supervened sometime after September, 1940 :—

Held, first, that tuberculosis contracted in these conditions was an " injury " within s. 2, sub-s. 1 (*c*) of the Police Pensions Act, 1921, and secondly, that it was the direct result of and therefore suffered in the execution of his duty within the meaning of the same sub-section, and that consequently the appellant was entitled to the special pension therein referred to.

Appeal from City of London quarter sessions.

In 1939 the respondent, Denis Edward Garvin, joined the City of London police force as a constable. He served during the aerial bombardments between September, 1940, and the middle of 1941, for twelve hours a day instead of the usual eight hours, with irregular meals and constant wettings. In March, 1942, he was found to be suffering from tuberculosis of the right lung, and in October, 1942, he was discharged from the police force. The respondent's family had no history of tuberculosis and the medical evidence was that the conditions of service in 1940 and 1941 would render a healthy man more liable to tuberculosis and that the onset of the disease was certainly after 1939 and probably after September, 1940. The respondent claimed a pension in respect of infirmity occasioned by an " injury " within the meaning of s. 2, sub-s. (1.) (*c*), of the Police Pensions Act, 1921 (1). The appellants, the police authority for the city of London, rejected the claim, but quarter sessions allowed an appeal by the respondent under s. 17, sub-s. 1 (*b*), of the Act, on the ground that the tuberculosis was an " injury received in the execution " of the respondent's duty " within s. 2, sub-s. 1 (*c*). The police authority appealed.

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(1) Police Pensions Act, 1921, s. 2, sub-s. 1: " Subject to the " provisions of this Act, every " member of a police force . . . . " (*c*) if at any time he is incapacitated for the performance " of his duty by infirmity of mind " or body occasioned by an injury " received in the execution of his " duty without his own default, " shall be entitled on a medical " certificate to retire and receive " a special pension for life."

By s. 33 : " For the purposes of " this Act . . . . (2.) Any injury " suffered by a member of a police " force . . . . (*c*) in consequence of " some act performed in the " execution of his duty . . . . shall " be deemed to have been suffered " in the execution of his " duty . . . ."

H. G. Robertson for the police. The contracting of tuberculosis is not an " injury " within s. 2, sub-s. 1 (*c*), of the Act of 1921. The injury contemplated therein is injury caused by an accident, i.e. a something short, sharp, sudden, violent, and unexpected. Catching cold is analogous to contracting tuberculosis, but, as Lord Robertson said in his dissenting judgment in *Brintons, Ld.* v. *Turvey* (1), no one would say that one who had caught cold had met with an accident. Sub-s. 2 of s. 33, the definition section, supports this contention. Paragraph (*a*) of that sub-section defines the injury which is to be deemed to be suffered in the execution of the officer's duty as suffered " whilst on duty or whilst on a journey," which are defined times, whereas tuberculosis is contracted gradually. Paragraphs (*b*) and (*c*) both refer to injury suffered in consequence of some " act," again a definite point of time and not " course of action," and para. (*d*) also refers to a definite, isolated act. Sub-section 3 speaks of an injury which is " intentionally inflicted, or incurred in the performance of " *a* duty," language quite inapplicable to the contracting of a disease such as tuberculosis. Disease per se cannot be an injury though it may ensue from injury.

Sellers K.C. and *Horniman* for the respondent. The medical evidence makes it clear that the cause of the tuberculosis was the hard nature of the respondent's service in 1940 and 1941. The lesion in the lungs occasioned by tuberculosis is, in fact, an injury, and there seems no reason why it should not be an " injury " within the Act. In *Brintons, Ld.* v. *Turvey* (2), under a Workmen's Compensation Act, infection from anthrax—a disease caused by a bacillus, as is tuberculosis—was held to be an " injury by accident " within s. 1 of the Act of 1897. In *Dover Navigation Co., Ld.* v. *Craig* (3) yellow fever contracted from a mosquito bite, and in *Walker* v. *Bairds & Dalmellington, Ld.* (4) broncho-pneumonia contracted

(1) [1905] A. C. 230, 236.
(2) [1905] A. C. 230.
(3) [1940] A. C. 190.
(4) 1935 S. C. (H. L.) 28.

through a chill, were held to be injuries by accident under the Act of 1925. The respondent's injury was received "in the "execution of his duty" within s. 2, sub. s. 1 (*c*), as appears from the medical evidence, and the terms of s. 33, sub-s. 2 (*c*), make that clear beyond doubt.

Robertson replied.

Cur. adv. vult.

Feb. 2. HUMPHREYS J. [after stating the facts]: The submissions of law for our decision may be summarized as follows: —Quarter sessions was wrong in law in holding (1.) that tuberculosis was an injury within the meaning of s. 2, sub-s. (1.) (*c*), of the Act, and (2.) that the tuberculosis of the respondent was an injury received in the execution of his duty.

In my opinion, ground (1.) is quite misconceived. I am not aware of any legal principle or canon of construction which should prevent tuberculosis from being described as an injury occasioning infirmity of body. Pulmonary tuberculosis is induced by an infection of the lung with a bacillus. Medical men speak and write of the lesion of tuberculosis, and a lesion is defined as a wound or injury. We are told that this is the first occasion on which this point has come up under this Act for decision by the High Court, but for many years the courts have been occupied in construing the expression to be found in the various Workmen's Compensation Acts, "injury by "accident." I find that, as far back as 1905, it was held in the House of Lords in *Brintons, Ld.* v. *Turvey* (1) that a workman employed in sorting wool who was infected with the bacillus of anthrax, from which disease he died, had thereby suffered an "accident causing injury." Lord Halsbury L.C., in the course of his opinion, observed (4.): "When some affection of our physical frame is in any way "induced by an accident, we must be on our guard that we are "not misled by medical phrases to alter the proper application "of the phrase 'accident causing injury,' because the injury "inflicted by accident sets up a condition of things which "medical men describe as disease." Later he says: "It "does not appear to me that by calling the consequences of an "accidental injury a disease one alters the nature or the "consequential results of the injury that has been inflicted." In the recent case of *Fife Coal Company, Ld.* v. *Young* (2),

(1) [1905] A. C. 230, 236.

(2) [1940] A. C. 479.

Viscount Caldecote L.C. took occasion, in giving his opinion in the House of Lords, to review the authorities on this branch of the law, and, in referring to the dissenting judgment of Lord Robertson in *Brintons, Ld.* v. *Turvey*, said (1): "In "view of a later decision, to which I shall refer, it is of some "interest to observe Lord Robertson's opinion that nobody "could think of saying that a man who had caught cold had "met with an accident." The later decision there referred to was *Walker* v. *Bairds & Dalmellington, Ld.* (2). In that case the workman had died from broncho-pneumonia caused by a chill contracted through exposure to cold and water. His widow was held entitled to an award on the ground that the workman had suffered "injury by accident" within the meaning of s. 1 of the Workmen's Compensation Act, 1925. Indeed, the ratio decidendi of the cases under the Workmen's Compensation Acts in which the courts have been compelled to disallow the claim of the workman or his dependants, of which an example is *Walker* v. *Hockney Brothers* (3) (the case of a man who gradually over a period of years acquired paralysis by riding a carrier bicycle) has been, not the absence of proved injury, but the failure, as Viscount Caldecote puts it (4) "to "identify any event which could, however loosely, be called an "accident." In the present case there is no necessity to prove an accident, indeed, there is an express provision that the injury occasioning the incapacity may be accidental or not, for s. 12, sub-s. 2, of this Act requires the police authority to determine on an application for a special pension whether the injury was accidental or not. In either case the applicant is entitled to a pension which is, however, slightly smaller in the case of an accidental injury than in the case of a non-accidental one. In my opinion, the first ground of appeal fails.

The second ground raises, I think, a more difficult question. The words to be construed are "injury received in the execution "of his duty without his own default." No default by the respondent is here suggested. That the words "in the "execution of his duty" are to receive a benevolent interpretation is clear when reference is made to s. 33, the interpretation section. By sub-s. 2 of that section, injury suffered by a member of a police force is deemed to have been suffered in the execution of his duty if so suffered whilst on a journey to or from duty or in consequence of some act performed in the

(1) [1940] A. C. 484.
(2) 1935 S. C. (H. L.) 28.
(3) (1909) 2 W. B. C. C. 20.
(4) [1940] A. C. 484.

execution of his duty. A pensionable injury, therefore, if I may use that term, may be suffered at a time when the man is not actually on duty. There must, undoubtedly, be some degree of causal relation between the injury and the duty. It would not be sufficient for the claimant to say: "I was a "serving policeman when I contracted tuberculosis." It would probably be impossible in any case of pulmonary tuberculosis to establish by evidence the day or the week, or, perhaps, even the month, during which the infection of the lung occurred, but where it is shown that the conditions of service during the critical period were such as to cause unusual mental and bodily strain which, acting on a frame ordinarily healthy but at the time enfeebled by long hours of duty, frequent wettings and such matters, rendered it more liable than usual to such infection, I think the injury might be described as being the direct result of, and, therefore, suffered in, the execution of duty. The evidence in the present case was slight. I might have hesitated myself before coming to the same conclusion as the quarter sessions, but it is to be remembered that we are not called on in this appeal to come to any conclusion on the facts. The decision of quarter sessions in that respect is final. The tribunal consisted of persons peculiarly fitted to decide the relevant questions of fact, and I am not prepared to say that there was no evidence on which they could award a special pension to the respondent. I think the appeal fails and should be dismissed.

ASQUITH J. I agree.

CASSELS J. I agree.

Solicitor for appellants: *City Solicitor*.
Solicitors for respondent: *Marris & Shepherd*.

W. L. L. B.

1944
Jan. 12;
Feb. 2.

ALLEN *v.* EMMERSON AND OTHERS.

Local government—Licence—Place of public entertainment—Fun fair—Barrow-in-Furness Corporation Act, 1868 (31 *&* 32 *Vict., c. civ.*), *s.* 166—*Barrow in-Furness Corporation Act*, 1872 (35 *&* 36 *Vict., c. cxiii.*), *s.* 33.

By s. 166 of the Barrow-in-Furness Corporation Act, 1868: "Any justice may, by order in writing, authorise any constable

" to enter into any building or part of a building or any place " kept or used or suspected to be kept or used for stage plays " or dramatic entertainments, into which admission is obtained " by payment of money, and which is not a licensed theatre, at " any time when the same is open for the reception of persons " resorting thereto, and to take into custody any person found " therein without lawful excuse ; and every person keeping, using, " or knowingly letting any building or part of a building or any " place for the purposes aforesaid, or any of them, shall be liable " to a penalty not exceeding 20*l.* ; and every person performing " or being therein without lawful excuse shall be liable to " a penalty not exceeding forty shillings ; and the burden of " proving that any such place is a licensed theatre shall be upon " the person keeping the same."

By s. 33 of the Barrow-in-Furness Corporation Act, 1872 : " No theatre or other place of public entertainment (other than " such places of entertainment as are now subject to the provisions " of s. 164 of the Barrow-in-Furness Corporation Act, 1868, " and which last mentioned places are to continue subject to the " provisions of that Act) shall be opened or used unless the same " shall first have been licensed by the Corporation, who shall have " absolute discretion as to the duration of every licence from " time to time to be granted for the use of any such theatre or " other place, and all other the terms and conditions whatever of " such licence ; and the provisions of cl. 166 of the Barrow-in-" Furness Corporation Act, 1868, shall apply to every such " theatre or other place which shall not for the time being be " licensed under this clause."

In the borough of Barrow-in-Furness were certain premises known as fun fairs, parts of which were sub-let by the proprietors to persons each of whom occupied a stall. In these stalls were automatic slot-machines, pin bagatelle tables, target machines, shooting ranges and the like. The public could obtain admission to the fun fairs as a whole without the payment of any money, but if any person desired to operate any of the machines he would have to pay the appropriate charge. None of the premises were licensed by the corporation. The proprietors and lessees of stalls in the fun fairs were charged before a court of summary jurisdiction with having committed an offence under s. 33 of the Act of 1872 and s. 166 of the Act of 1868. In an appeal against the decision of the justices dismissing the informations :—

Held, (1.) that when s. 33 of the Act of 1872 and s. 166 of the Act of 1868 were read together, the result was not to limit the requirement of a licence from the corporation to places of public entertainment to which admission could only be obtained on payment of money ; (2.) that the words " theatres and other places " of public entertainment " in s. 33 of the Act of 1872 were not to be read as subject to the ejusdem generis rule ; (3.) that, assuming that the ejusdem generis rule did not apply, a fun fair was a place of public entertainment within s. 33.

1944

ALLEN
v.
EMMERSON

CASE stated by justices for Barrow-in-Furness.

Informations were laid by the appellant, the town clerk of Barrow-in-Furness, as representing the corporation, against ten respondents in respect of a number of alleged offences, under s. 33 of the Barrow-in-Furness Corporation Act, 1872, and s. 166 of the Barrow-in-Furness Corporation Act, 1868. The respondents fell into three groups. Each group included the proprietor or manager (or both) of premises known as a "fun fair." The groups further included a number of persons to whom the owner had sublet parts of the premises, but the issues raised in all the informations were identical, and they were all tried together.

The following facts were found or admitted : The respondent, Emmerson, was the proprietor of fun fair premises in Rawlinson Street. Part of these he retained in his own possession, and in this part there was a roundabout or merry-go-round. The rest of the floor space he sublet to seven of the respondents, each of whom acquired or occupied a stall thereon. In these stalls there were automatic slot machines, pin-bagatelle tables, target machines, shooting ranges, and the like. The public could obtain admission to the fun fair as a whole without paying any fee. If they desired to go on the merry-go-round or operate any of the machines they would have to pay the appropriate charge, but they were at liberty without making payment to wander about the place in the character of spectators. The same conditions prevailed at the fun fair premises of the Barrow Arcade, Ld., known as the Play Beach Arcade, and at the fun fair premises of Frederick Newbury Smith, known as the Sportland Funfair, Dalton Road, with the differences that at neither of these places did the owner work a roundabout or merry-go-round of his own. None of the three sets of premises were licensed by the Barrow-in-Furness Corporation.

The justices dismissed the informations on the ground that none of the fun fairs was an "other place of public entertainment" within s. 33 of the 1872 Act. The appellant appealed.

Sydney Turner K.C. and *Blackledge* for the appellant.

C. Q. Henriques for some of the respondents.

Alban Gordon for the remainder of the respondents.

The arguments appear from the judgment.

Cur. adv. vult.

Feb. 2. ASQUITH J. read the judgment of the court (HUMPHREYS, ASQUITH and CASSELS JJ.), in which he set out the facts stated above and continued: The provisions of s. 166 of the Barrow-in-Furness Corporation Act, 1868, apply only to buildings, etc., (1.) not being licensed theatres, used for stage plays or dramatic performances, (2.) into which admission is obtained by payment of money. It will be observed that the last four lines of s. 33 of the Barrow-in-Furness Corporation Act, 1872, incorporate s. 166 of the earlier Act. Whether they incorporate the whole of that section or part only, and, if so, which part, is among the questions raised by the case. The respondents sought to support in this court the decision of the justices in dismissing the informations by three contentions in particular, any one of which, if established, would have been sufficient for their purpose, namely: (1.) that, if s. 33 of the Act of 1872 and s. 166 of the Act of 1868 are read together, the result, on a true construction is to limit the requirement of a licence from the corporation to places of public entertainment to which admission can only be obtained by payment of money, whereas admission to the fun fairs could be obtained without any such payment; (2.) that when s. 33 of the Act of 1872 speaks of "theatres and other places of public entertainment" the words "other places of public entertainment" must be read subject to the ejusdem generis rule, and, so read, would not include the fun fairs in question; (3.) that, read apart from the ejusdem generis rule and in their ordinary restricted sense, the words "places of public entertainment" would not include such places as fun fairs. The justices, in reaching the conclusion they did, may have approved one or more or all three of these propositions. The appellant in this court sought to disprove them.

We are of opinion that the appellant has succeeded on all three issues, with which we will proceed to deal in turn.

(1.) Section 166 of the Act of 1868 provides for penalties (and rights of entry by the police) applicable to buildings and places kept or used for stage plays or dramatic entertainments, into which admission is obtained by the payment of money unless licensed as a theatre. Section 33 of the Act of 1872 (whether read subject to or free from the ejusdem generis rule) extends the subject-matter to which the requirement of a licence applies. The licence is to be one from the corporation of Barrow-in-Furness. The extended subject-matter is "theatres and other places of public entertainment." So far as theatres are concerned, therefore, two licences are required—one under the Theatres Act, 1845, and a second from the corporation. So far as "other places of public "entertainment" are concerned, this expression on any construction includes more than the places covered by the Act of 1868, viz., "places for the performance of stage plays "or dramatic entertainment." If, in respect of this wider subject-matter, the Act of 1872 had been intended to limit the requirement of a corporation licence to such of them as charged a fee for admission, nothing could have been easier than to say so explicitly in the first line or two of s. 33 and to speak there of "theatres or other place of public entertainment "admission to which can only be obtained by a payment of "money." The inference from this omission, if the first lines of the section stood by themselves, would be that its framers intended that "other places of public entertainment" must obtain corporation licences whether they charged an admission fee or not. It is sought by the respondents to displace this inference by praying in aid the last four lines of s. 33 "and "the provisions of cl. 166 of the Barrow-in-Furness Corporation "Act, 1868, shall apply to every such theatre or other place "which shall not for the time being be licensed under this "clause." In our view, this sentence merely applies the provisions as to entry by the police and penalties which s. 166 of the Act of 1868 authorizes in regard to certain buildings and places, admission to which can only be obtained by a payment of money, to the wider subject-matter, viz., "theatres and other places of public entertainment," whether, in respect of the latter, a fee for admission is charged or not.

(2.) Are the words "theatre or other place of public "entertainment" in s. 33 of the Act of 1872 to be read subject to the ejusdem generis rule or not? We are satisfied, on the one hand, that, if they have to be read subject to the restriction of this rule, a fun fair of the kind involved in this case is not a kind of "public entertainment" of the same genus as a theatre. We are not, however, of opinion that the ejusdem generis rule applies to the words in question, and this for the following, among other, reasons:—(*a*) the words in question are followed by words in brackets "(other than "such places of entertainment as are now subject to the "provisions of s. 164 of the Barrow-in-Furness Corporation "Act, 1868, and which last mentioned places are to continue "subject to the provisions of that Act)." Words excepting a species from a genus are meaningless unless the species in question prima facie falls within the genus. "All hats other "than top hats" makes sense. "All top hats other than "bowler hats" does not: nor does "all hats and other articles "except gloves" if "other articles" is to be construed ejusdem generis with "hats." Now, the places covered by s. 164 of the Act of 1868—the places "excepted"—do not fall within the assumed genus "theatres and other similar places "of public entertainment" although there may be an overlap between the two. (*b*) No case was cited to us in which a genus has been held to be constituted, not by the enumeration of a number of classes followed by the words "and other," but by the mention of a single class (in this case theatres) followed by those words. (*c*) The tendency of the more modern authorities is to attenuate the application of the ejusdem generis rule: cf. *Anderson* v. *Anderson* (1).

(3.) The third question is whether, assuming the ejusdem generis rule does not apply, a fun fair of the sort involved here is a "place of public entertainment" within s. 33 of the Act of 1872. The respondents argue that on this point there is authority in their favour, and that, apart from authority, such fun fairs are not places of public entertainment or, perhaps, of entertainment at all. The authority relied on is *Attorney-General* v. *Southport Corporation* (2). This case was decided under a revenue statute dealing with entertainment tax which contained a special definition of "entertainment" for its own purposes. Such a definition affords little guidance to the meaning of the same term in a different statute passed alio intuitu. The facts were that at Southport persons could by payment obtain access to an enclosure by the sea which, along with other amenities, such as suntraps, shelters, and walks, contained a bathing pool. Those who paid to enter the enclosure might do so to bathe, or they might do so to sit in the sun or out of the wind, or to watch the bathers in the pool. The performances of the bathers were quite unorganized. No one arranged their activities to divert spectators or to give a deliberate "performance" of any kind. In these circumstances it was held that the bathing was not an "entertainment" such as to attract tax. We do not think that a case decided on facts so different from those of the present case and on the basis of a special statutory definition of the word

(1) [1895] 1 Q. B. 749.

(2) [1934] 1 K. B. 226.

" entertainment " helps us to decide the meaning of the term here. Apart from authority the respondent argued that " public entertainment " involves the existence of entertainers and persons entertained, and that where persons resort to premises where there are no entertainers and entertain themselves by means of the machines there provided the place is not one of public entertainments. The case under this head was persuasively put by asking whether persons who hire a tennis court in a public park, and, possibly, rackets and balls, take part in a public entertainment. The answer to this is, we think, " No," but hiring the accommodation and apparatus for engaging in a game or sport is essentially a different activity from that of working the machines provided in this case. We think a satisfactory working definition of " public entertainment " was one suggested by Mr. Turner in argument, namely, " a place open to members of the public " without discrimination who desire to be entertained and " where means of entertainment are provided." Judged by this test, or, indeed, by the ordinary use of language, these fun fairs were, in our view, " places of public entertainment " and none the less so because no fee was charged for admission to the premises.

We are of opinion that the justices determined the question raised in the case wrongly. The case must be remitted to them to give effect to this decision.

Case remitted.

Solicitors for appellant : *Sharpe, Pritchard & Co., for W. L. Allen, Town Clerk, Barrow-in-Furness.*

Solicitors for respondents : *Kenneth Brown, Baker, Baker, for W. H. Winder & Clift, Lancaster ; Oswald Hanson & Smith.*

R. F. S.

C. A.

1944
Feb. 9, 10, 11.

LACE *v.* CHANTLER.

Landlord and tenant—Tenancy—Validity—Letting " for the duration " of the war."

The plaintiff was tenant of a dwelling-house which she sub-let to the defendant at the rent of 16*s.* 5*d.* a week. The agreement for the sub-letting was partly oral and partly by conditions contained in the rent-book, one of those conditions being expressed by the words " furnished for duration." The plaintiff alleged that the defendant had removed certain articles which were her property, contrary to the conditions of the agreement; and she gave him notice to quit. As the defendant did not comply with the notice, the plaintiff brought an action for possession in the county court. The county court judge found that the defendant had broken a condition of the agreement by removing the articles, and he made an order for possession in one month. The defendant appealed. Among the grounds of defence to the action in the county court was the following: "The said dwelling-house was let to the "defendant for the duration of the war." The question of the validity of a letting "for the duration of the war" was not argued in the county court, but it was raised at the hearing of the appeal:—

Held, that a tenancy "for the duration of the war" does not create a good leasehold interest, the term, when the agreement takes effect, being uncertain, and, also, that it was impossible to construe this tenancy as a lease for a long period, e.g., ninety-nine years, determinable on the cessation of the war.

Great Northern Railway Co. v. *Arnold*, (1916) 33 T.L.R. 114 distinguished.

APPEAL from Barrow-in-Furness and Ulverston county court.

The material facts are contained in the head-note.

L. F. Sturge for the defendant. There was a valid letting for the duration of the war. There is no question of uncertainty when the duration of the lease is capable of being ascertained, even though it cannot be ascertained as from its beginning: *Bishop of Bath's Case* (1). There must be a means of ascertaining the date of the beginning of a lease beforehand, but the position as to the duration of the term is different: *Goodright* v. *Richardson* (2). Alternatively, the tenancy could be regarded as a lease for a long period, e.g., ninety-nine years, determinable on the cessation of the war: *Great Northern Railway Co.* v. *Arnold* (3); *Swift* v. *MacBean* (4). [He referred to *Zimbler* v. *Abrahams* (5) and Woodfall's Landlord and Tenant, 24th ed. p. 268.] If the agreement in this case cannot be supported in any other way, it might be regarded as a licence, granting rights for the duration of the war, and such a licence would undoubtedly be valid.

Dare for the plaintiff was not called on to argue.

(1) (1605) 6 Co. Rep. 34 b.
(2) (1789) 3 Term Rep. 462.
(3) (1916) 33 T. L. R. 114.
(4) [1942] 1 K. B. 375, 384.
(5) [1903] 1 K. B. 577.

LORD GREENE M.R. We have not heard arguments in support of the judgment under appeal. The reasons given for it invite criticism. The county court judge apparently held that a right of re-entry was to be implied on breach of that condition which he found had been broken, and it is also to be observed that no notice under the Law of Property Act, 1925, was ever served by the landlord. The question might have arisen whether in those circumstances the county court judge had any jurisdiction to make an order for possession on the ground of breach of covenant. However, it is not necessary to go into that matter, because, in my opinion, the judgment is perfectly correct for reasons other than those advanced by the judge. It is correct, because the notice to quit was good and effectively brought the tenancy to an end.

Normally there could be no question that this was an ordinary weekly tenancy, duly determinable by a week's notice, but the parties in the rent-book agreed to a term which appears there expressed by the words " furnished for duration," which must mean the duration of the war. The question immediately arises whether a tenancy for the duration of the war creates a good leasehold interest. In my opinion, it does not. A term created by a leasehold tenancy agreement must be expressed either with certainty and specifically or by reference to something which can, at the time when the lease takes effect, be looked to as a certain ascertainment of what the term is meant to be. In the present case, when this tenancy agreement took effect, the term was completely uncertain. It was impossible to say how long the tenancy would last. Mr. Sturge in his argument has maintained that such a lease would be valid, and that, even if the term is uncertain at its beginning when the lease takes effect, the fact that at some future time it will be rendered certain is sufficient to make it a good lease. In my opinion, that argument is not to be sustained.

I do not propose to go into the authorities on the matter, but in Foa's " Landlord and Tenant," 6th ed., p. 115, the law is stated in this way, and, in my view, correctly: " The " habendum in a lease must point out the period during which " the enjoyment of the premises is to be had; so that the " duration, as well as the commencement of the term, must be " stated. The certainty of a lease as to its continuance must " be ascertainable either by the express limitation of the " parties at the time the lease is made, or by reference to some

" collateral act which may, with equal certainty, measure the " continuance of it, otherwise it is void. If the term be fixed " by reference to some collateral matter, such matter must " either be itself certain (e.g., a demise to hold for ' as many " ' years as A. has in the manor of B.') or capable before the " lease takes effect of being rendered so, (e.g., for ' as many " ' years as C. shall name.' ") The important words to observe in that last phrase are the words " before the lease takes " effect." Then it goes on : " Consequently, a lease to endure " for ' as many years as A. shall live,' or ' as the coverture " ' between B. and C. shall continue,' would not be good as " a lease for years, although the same results may be achieved " in another way by making the demise for a fixed number " (ninety-nine for instance) of years determinable upon A.'s " death, or the dissolution of the coverture between B. and C." In the present case, in my opinion, this agreement cannot take effect as a good tenancy for the duration of the war.

The question then arises whether it can take effect in any other way. It was suggested that the difficulty would be got over by construing the tenancy as a lease for a long period, e.g., ninety-nine years, determinable on the cessation of the war. In my opinion, it is impossible to construe this tenancy in that way. It is true that, in *Great Northern Railway Co.* v. *Arnold* (1), Rowlatt J. found it possible to treat a tenancy for the duration of the last war, the rent being payable weekly, as though a lease for nine hundred and ninety-nine years terminable on the cessation of the war had been created. He had some assistance in arriving at that conclusion in the fact that there was a definite undertaking by the landlords not to serve a notice to quit during the period. The actual words, as stated in the head-note, were : " The landlords said that " they did not intend that he should be subject to a week's " notice." That case can, in my opinion, only be supported because of the presence of that term of the agreement.

Is there any other possible construction ? It is not contended that this tenancy agreement can be construed as though it were a grant of a freehold interest. The only way in which one could convert this into a freehold interest would be by construing it as an agreement for a life tenancy terminable at the end of the war. It is impossible to construe this agreement as anything of the kind.

Lastly, Mr. Sturge argued that the agreement could be

(1) (1916) 33 T. L. R. 114.

construed as an agreement to grant a licence. In my opinion, it is impossible to construe it in that sense. The intention was to create a tenancy and nothing else. The law says that it is bad as a tenancy. The court is not then justified in treating the contract as something different from what the parties intended, and regarding it merely as a contract for the granting of a licence. That would be setting up a new bargain which neither of the parties ever intended to enter into. The relationship between the parties must be ascertained on the footing that the tenant was in occupation and was paying a weekly rent. Accordingly, it must be the relationship of weekly tenant and landlord and nothing else.

Some reliance was placed on *Zimbler* v. *Abrahams* (1), a decision of this court. In that case the landlord let a house at a weekly rent and agreed not to raise the rent nor give notice to quit so long as the tenant lived in the house and paid the rent regularly. The decision of this court was that the tenant was entitled to specific performance, but the subject-matter of the specific performance is left obscure. The alternative interpretations which appear to have been put on the agreement were that it was either an attempt to create an immediate demise for the life of the tenant, or an agreement to grant a lease for the life of the tenant. If the contract was construed as an agreement to grant a lease for the life of the defendant, one can understand it being so treated. I need not make any comment on that decision except to say that the ratio decidendi, if I have rightly understood it, does not appear to afford any assistance in the present case because it was based on the construction of the contract in that case which cannot be placed on the present agreement.

In the result, therefore, the judgment of the county court judge was correct and the order for possession was rightly made. The appeal must therefore be dismissed.

MACKINNON L.J.: I agree. A hard case and a good case may equally lead to bad law. The county court judge made the order because of his disapproval of the defendant's conduct. I think that is bad law. Whether the same reason led Rowlatt J. to a similar result in *Great Northern Railway Co.* v. *Arnold* (2) it is not necessary to decide; but it may be noted that Rowlatt J. expressly said that his conclusion was arrived at "by hook or by crook" rather than on legal principles. Though

(1) [1903] 1 K. B. 577.

(2) 33 T. L. R. 114.

C. A.
1944
LACE
v.
CHANTLER.

it may truly be said that the reasons given by the county court judge in the present case were bad, that does not prevent his judgment from being supported for a reason that is good in law, though not mentioned by him. That good reason has been given by the Master of the Rolls, and on that ground I agree that the appeal should be dismissed.

LUXMOORE L.J.: I agree.

Appeal dismissed.

Solicitors for defendant: *Maddocks & Colson, for P. Kemp Lee, Barrow-in-Furness.*

Solicitors for plaintiff: *Hargreaves & Crowthers, for Hart Jackson & Sons, Barrow-in-Furness.*

In re AFFAIRS OF EVANS AND EVANS.

C. A.
1944
Feb. 18.

Emergency legislation—Liabilities adjustment—Practice—Application for adjustment order—Preliminary hearing—Need to be ex parte—Liabilities (War-Time Adjustment) Rules, 1942 (*St. R. & O.*, 1942, *No.* 1302 L. 21), *r.* 14 (1.).

On the true construction of the Liabilities (War-Time Adjustment) Rules, 1942, the "preliminary hearing" (including any adjournment thereof) of a debtor's application for an adjustment order under the Liabilities (War-Time Adjustment) Act, 1941, must be heard ex parte. What in the rules is called the "adjourned "hearing" only takes place (when necessary) after the court has come to a decision at the "preliminary hearing," and it is for this "adjourned hearing" that the registrar of the court must, by r. 20, sub-r. 1, give seven clear days' notice to every creditor. When, therefore, a county court registrar gave notice to a creditor of the date of the adjourned hearing of the "preliminary hearing" and the creditor appeared, his solicitor being heard and evidence being given in opposition to the application, an irregularity had been committed which invalidated any order then made by the county court judge.

APPEAL from Southend county court.

By a lease dated August 16, 1935, one Spencer (hereinafter called "the landlord") let 650–656 London Road, Westcliff-on-Sea, to the debtors, R. P. Evans and L. C. Evans, at a yearly rent of 450*l.* From time to time after June 24, 1938, the debtors were in arrears with the payment of the rent and at

C. A.
1944

AFFAIRS OF EVANS AND EVANS, *In re.*

various dates the landlord accepted reduced rents subject to their punctual payment. On August 9, 1943, after the debtors had failed to make due payment, the landlord began proceedings in the High Court for possession of the premises and for arrears of rent amounting to 1,580*l.* 10*s.* On August 20, 1943, the debtors applied in the county court for the services of the liabilities adjustment officer, and on October 23, 1943, after negotiations for a settlement had been unsuccessfully made with the landlord, the debtors, acting on the advice of the liabilities adjustment officer, applied to the county court for a liabilities adjustment order and a protection order under the Liabilities (War-Time Adjustment) Act, 1941. The application came before the county court judge on November 11, 1943, for a preliminary hearing, which he adjourned until after the proceedings in the High Court had been heard. On November 16, 1943, the High Court proceedings were stayed pending the decision of the county court judge in the application made under the Act of 1941. The preliminary hearing again came before the county court judge on December 19, 1943, but before then the registrar of the county court had given notice to the landlord of the date of this adjourned preliminary hearing and the landlord appeared at this hearing with his solicitor to oppose the debtors' application. At this hearing the county court judge dismissed the debtors' application. The debtors appealed, the only material ground of the appeal being that the county court judge improperly allowed the landlord to appear and be represented by his solicitor at the preliminary hearing and improperly admitted evidence by affidavit of the landlord.

Safford for the debtors. The county court judge ought not to have allowed anyone but the debtors and the liabilities adjustment officer to attend at the adjourned preliminary hearing. By the Liabilities (War-Time Adjustment) Rules, 1942, r. 12, sub-r. 1, no person is to be named as a respondent on an application for an adjustment order, and by sub-r. 2, when the debtor is advised by the liabilities adjustment officer to apply, that officer will make his report. All that was duly done here. Rule 12, sub-r. 4, provides for the issue to the applicant of a plaint note in the ordinary form, but, in view of sub-r. 1, there can be no respondent. Then, by r. 14, sub-r. 1, the preliminary hearing of such an application is to be in private, and by sub-r. 2 the judge may either dismiss the application, or, whether a protection order be made or not, refer the debtor's affairs to the liabilities adjustment officer. Further, when the preliminary hearing is completed, the application for an adjustment order, if not dismissed, stands adjourned. The subsequent hearing is what is called the "adjourned hearing," and, by r. 14, sub-r. 6, it is to be heard in private, unless the judge otherwise directs. The present case arose under r. 5 of the rules of 1942 (added by the Liabilities (War-Time Adjustment) Rules, 1943), as the liabilities adjustment officer advised the debtor to apply, considering that they were in serious difficulty owing to the war. The provision for hearing in private in r. 14, sub-r. 1, means that only the parties to the application may attend at the preliminary hearing, and as, by r. 12, sub-r. 1, no-one is to be made a respondent, the preliminary hearing must be heard ex parte. The creditors may only be given notice of the "adjourned hearing" and then notice must, by r. 20, sub-r. 1, be given to every creditor. A serious irregularity was committed in allowing the landlord to attend the adjourned preliminary hearing and the court should order a rehearing. In the expectation of an ex parte hearing the debtors would only prepare a statement sufficient to establish a prima facie case for their protection.

P. C. Lamb for the landlord. The county court judge must be taken to have arrived at a decision on the preliminary hearing and to have directed the registrar to issue the notice complained of for a hearing which was really the adjourned hearing. In any case, on the facts his decision was based on the liabilities adjustment officer's report and the facts in the debtors' affidavit. Further, the debtors have no merits, and in justice the court should consider the case and decide it instead of sending it back for rehearing; see s. 109 of the County Courts Act, 1934.

Lord Greene M.R. This appeal raises a point of general importance with regard to the procedure followed at the adjourned hearing of the debtors' application, it being attacked by them on the ground of irregularity. If the attack be justified—as I think it is—the irregularity, in my opinion, made abortive the proceedings at which the debtors' application was dismissed.

Under the Liabilities (War-Time Adjustment) Rules, 1942, it is contemplated that in the course of proceedings under the

C. A.

1944

AFFAIRS OF EVANS AND EVANS, *In re.*

Lord Greene M.R.

Act of 1941 there may be two hearings, each having its own distinct character. One is called the "preliminary hearing," and the other, rather inconveniently, the "adjourned hearing." The rules contain provisions as to what should be done at each of those two stages of the hearing of an application. It is said on behalf of the debtors that the "preliminary "hearing" must be ex parte and that it is only at the stage of the "adjourned hearing" that other persons interested—creditors being, presumably, the principal ones—are entitled to come on the scene. When the learned judge in the present case had adjourned the preliminary application that the result of proceedings in the High Court might be ascertained, the registrar of the county court sent to the landlord of the premises occupied by the debtors a notice which stated that on October 27, 1943, the debtors had applied to the court for a liabilities adjustment order, that the court had adjourned the hearing of the application, and that the adjourned hearing would take place on a stated day. Encouraged by the receipt of that document, the landlord, by his solicitor, appeared at the hearing, the solicitor bringing with him certain evidence which he desired to put before the court. The judge's note states that he heard the landlord's solicitor. If the contention of the debtors is right, it was not open to the registrar to send that notice, and it was not open to the judge to allow the landlord as a creditor to appear, much less to tender evidence or be heard. The whole of those proceedings at that stage, on the debtors' argument, were necessarily ex parte, and Mr. Safford says that, where an applicant to the court is entitled to anticipate an ex parte hearing and to come unprepared with material and professional assistance to deal with other persons, it would be a serious irregularity to allow any other person to appear unexpectedly and take part in the proceedings. This argument necessitates an examination of the relevant provisions of the rules. Rule 12 deals with a debtor's application. Sub-r. 1 is: "An application by a debtor "for an adjustment order shall be in Form 5 and no person "shall be named as respondent thereto." The debtor, therefore, is told that when he first comes to the court he need not make a creditor or anybody else a party. The application is to be filed in the court office and supported by an affidavit and the report of the adjustment officer and it is to be entered in the books of the court and a plaint note given to the debtor.

Rule 14, sub-r. 1, provides: "The first hearing of an

C. A.

1944

AFFAIRS OF EVANS AND EVANS, *In re.*

Lord Greene M.R.

"application for an adjustment order (hereinafter called the "'preliminary hearing') shall be in private." "Preliminary "hearing" is used in a technical, special sense in these rules. The words "shall be in private" cannot be interpreted as meaning by themselves that the hearing is to be ex parte, but the fact that the hearing is to be ex parte appears from other provisions. All that the phrase means is that nobody but a person interested, nobody but a proper party, is entitled to be present at the hearing. In other words, the hearing is to be, in effect, a hearing in camera. Sub-rr. 2, 3 and 4 provide: "(2.) At the preliminary hearing (which may be adjourned "from time to time)"—I call attention to those words because there is an important distinction between the adjourned hearing of a "preliminary hearing" and the "adjourned "hearing" itself which comes about only after the preliminary hearing has been disposed of—"the judge may make an order "dismissing the application, or where the application is not "dismissed (*a*) may, if satisfied that a prima facie case has "been made out as to the matters specified in para. (*a*) or "para. (*b*) or sub-s. 1 of s. 3 of the Act, make a protection "order, and (*b*) whether the protection order has been made "or not, may refer the debtor's affairs or any question in the "proceedings to the adjustment officer or to the registrar for "investigation and report, or give such directions as the "judge may think fit as to the conduct of the proceedings. "(3.) The affidavit filed with the application shall be admissible "in evidence, but the judge may require further evidence to "be given orally or otherwise, as he thinks fit. (4.) When "the preliminary hearing has been completed, the application "for an adjustment order, if not dismissed, shall stand "adjourned." There again the distinction is brought out between the "preliminary hearing," which may be completed in one, two or three sessions, and the "adjourned hearing" which only takes place after the "preliminary hearing" has been completed. Then sub-r. 5 provides: "Any order "made at the preliminary hearing shall be drawn up by the "registrar and shall be served on the debtor, and, where a "creditor is the applicant, on the applicant, and, if the affairs "of the debtor are referred to the adjustment officer, on the "adjustment officer, and on such person as the court may "direct." It is only at that stage, when the order made at the preliminary hearing has been drawn up, that anybody other than the debtor and the adjustment officer comes on the

C. A.

1944

AFFAIRS OF EVANS AND EVANS, *In re.*

Lord Greene M.R.

scene. Sub-r. 6 provides: "Proceedings subsequent to the "preliminary hearing shall, unless the court otherwise orders, "be heard in private." Rule 20 deals with the adjourned hearing. Sub-r. 1 is: "When the adjustment officer or "registrar has reported to the court, or, if there has been no "reference for a report, when the registrar thinks fit, the "registrar shall fix a day for the adjourned hearing of the "application and shall give not less than seven clear days' "notice thereof to the adjustment officer . . . . to the debtor "and to every creditor in the list of creditors in the report "and to any other person whose attendance at the hearing "appears to the court to be desirable." By sub-r. 2: "The "procedure at the adjourned hearing (which may be adjourned "from time to time) shall be such as the court may determine, "but the adjustment officer and the debtor and every such "creditor and other person shall be given an opportunity of "addressing the court in person or by solicitor or counsel or "by any other person allowed by the court to do so." At this stage, therefore, the creditors, having been given notice of the "adjourned hearing," are expressly entitled to appear, and the proceedings are no longer ex parte. Sub-r. 2 of r. 21 provides that a copy of the adjustment order, if made, is to be served on the debtor and the adjustment officer and every person to whom notice of the adjourned hearing was given. Rule 22 deals with the intervention by a person not a party, and by sub-r. 5 (added by the 1943 rules): "Nothing in this "rule shall authorize an application for revocation of a protection order between the preliminary hearing and the "adjourned hearing of an application for an adjustment order." That contemplates, as I understand it, that an application under that rule cannot be made with the object of obtaining a revocation of the protection order until the "adjourned "hearing" in the special sense in which that phrase is used in these rules has come on.

Bearing in mind the crucial distinction between the "preliminary hearing" and adjournments of the preliminary hearing, on the one hand, and the "adjourned hearing" and adjourned hearings of the adjourned hearing, on the other hand, it seems to me clear that, just as the original application which the debtor makes is an ex parte application, so it remains until the "preliminary hearing" has been completed, and, if an order is made, that order will then be served on the creditors, who will then be entitled to appear at the "adjourned hearing."

No provision in the rules relating to the "preliminary hearing" gives the court any power to summon creditors or anybody else to that hearing. Further, when the rules bring the creditors on the scene, that applies to all of them. It would be intolerable that the court should be able to summon one creditor out of many and deal with the matter on the argument and the evidence adduced by him alone. That all the creditors should be entitled to attend is in accordance with obvious justice. I must not, of course, be taken as saying that on a particular hearing by the court of a matter in which only one creditor is interested, as for instance, a mortgagee, all the creditors must be summoned, but at the proceedings in general every creditor has got a right to attend.

In the present case an error was made by the registrar in sending the notice to the landlord. He must have been under the misapprehension that the adjourned hearing referred to in the notice was the "adjourned hearing" dealt with by r. 20, but, if he thought that, I do not understand why he did not summon the other creditors. The notice was wrongly sent out and there was no right in the landlord to be present at that hearing. It was suggested that, under the power given to the court in r. 14, sub-r. 2 (*b*), it would be competent to the judge to summon a creditor. In my opinion, that is not the right view of the language, for it would involve the judge altering the whole nature of the proceedings. The tentative suggestion that this was what happened here could not stand for a moment. Even if the judge had jurisdiction to summon a creditor he must have made an order for that purpose, and have made it in the presence of the debtor or communicated it to him.

If the view that I take as to the meaning of these rules is correct—and I take it without any hesitation—the irregularity, in my opinion, vitiates the proceedings. It would obviously be impossible, where a person who is not entitled to be present has been allowed to address the court and to lead evidence, to inquire into the state of the judge's mind with a view to ascertaining whether, and to what extent, the presence of that party, what he said, and the evidence that he led, affected the judge's mind in coming to his decision. In the present case the irregularity might, for all I know, not have had the slightest influence on the mind of the judge, but it would be highly undesirable if an irregularity of this kind could be condoned on its being shown that it had not affected the judge's mind.

The only thing that can be done is to send the case back for rehearing. It was suggested that this court ought to dismiss the application on its merits, but that is a course which, in my opinion, this court ought not to take.

This is not a mere technicality as I see it. It raises a question of important principle, because this Act deals primarily with people of small means who have not got money to spare for engaging the services of professional advisers sooner than they need, and it must happen over and over again that debtors appear in person at preliminary hearings under this Act without any professional assistance. It would be wrong if at that stage in the proceedings they suddenly found themselves confronted by somebody, such as a creditor, who, though the debtor would not know it, had no right to be there. Such a person might be assisted by counsel who was allowed to be heard and to submit arguments to the court and the result might well be in many cases that the debtor's case would be demolished at that stage without having his case considered as it ought to be at a preliminary hearing, when any order would be without prejudice to any change of view of the judge when the creditors ultimately come on the scene. The result, therefore, is that the appeal must be allowed and the matter go back to the learned judge.

MACKINNON L.J.: I agree. I do so with some regret and with a great deal of sympathy for Mr. Lamb's client. He having received the notice from the registrar, it was certainly not his fault that his attendance and intervention at the hearing on December 9 were in breach of the rules. Further, I have a strong suspicion—though I am not entitled to act on it—that if he had realized the irregularity of the notice that he had received from the registrar and had abstained from attending, the judge would have dismissed the application as he is entitled to do on the hearing of a preliminary application. I agree that this appeal must be allowed.

LUXMOORE L.J.: I agree.

Appeal allowed.

Solicitors: *Herbert Smith & Co.; W. R. Perkins, for Nelson L. Mitchell, Southend-on-Sea.*

H. C. G.

JOSHUA HENSHAW AND SON *v.* ROCHDALE CORPORATION.

C. A.

1944

Jan. 14, 13; *Feb.* 1

Contract—Building contract—Forfeiture clause—Failure to perform contract on date specified for completion—Work to be performed within reasonable time thereafter—Continuance in operation of clause—Notice given under clause—Leave of court not obtained—Right of contractors to damages for breach of contract—Courts (Emergency Powers) Act, 1939 (2 & 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (ii.), (iii.).

A contract for the erection by the plaintiffs of sewage plant on land of the defendant corporation provided, by cl. 28: "The "contractor shall carry on the work with due diligence and as "much expedition as the surveyor shall require and in case the "contractor shall fail to do so . . . . or if the works of this "contract are in the judgment of the surveyor not being carried "on in all respects . . . . with such progress as would enable "them to be efficiently completed at the time . . . . specified "the same shall be intimated to the contractor by the surveyor "and in case he refuse to alter or amend any defective or "unsatisfactory work or materials or comply with any . . . . . "order he may so receive to that effect . . . . then the corporation "or their authorized agents shall have full power without vitiating "the contract or affecting the obligations liabilities or responsi- "bilities of the said contractor . . . . and they are hereby "authorized after giving the contractor 48 hours' notice in writing "thereof to take the works wholly or in part out of the hands of "the contractor and to take possession of all the plant tools and "materials belonging to him and use or sell the same as the "absolute property of the corporation . . . ." The contract provided that the work should be completed on or before March 1, 1940, unless the surveyor should certify for the extension of the time for completion. The contract was not completed on March 1, 1940, but no extension of time was applied for and the work continued to be carried on after that date. On September 1, 1941, the surveyor wrote to the plaintiffs requiring them to alter or amend their arrangements so that the contract might be completed satisfactorily and expeditiously. On September 11, 1941, the corporation gave the plaintiffs 48 hours' notice under cl. 28 that the corporation intended to take the work wholly out of the hands of the plaintiffs and to employ other persons to perform it. The plaintiffs brought an action against the corporation for breach of contract, contending that cl. 28 had ceased to be operative as the date for the completion of the contract had passed. The plaintiffs also alleged that the action of the corporation in taking the works out of their hands without having first obtained the leave of the court was unlawful and contrary to the provisions of the Courts (Emergency Powers) Acts. The official referee held that cl. 28 continued in operation and found that the plaintiffs had failed to carry out the works with the diligence and with as

C. A.

1944

JOSHUA HENSHAW AND SON *v.* ROCHDALE CORP.

much expedition as the surveyor required and that the corporation were entitled under cl. 28 to give the notice which they did on September 11, 1941, but he awarded the plaintiffs damages because the corporation had given the notice without having first obtained the leave of the court. On an appeal by the corporation and cross-appeal by the plaintiffs :—

Held, that the statement in Hudson's Building Contracts, 6th ed., p. 412, on which the plaintiffs relied, that " in the case of " contracts giving a power of forfeiture for not proceeding with " the work at the required rate, if the contract date for completion " has ceased to be binding, no forfeiture for delay in progress can " be made, for there is no period in respect of which speed can be " gauged. The clause, therefore, can only be acted upon and " enforced in respect of delay when there is a date fixed for " completion, and confers no power of forfeiture after that date has " passed or has ceased to be applicable," was too wide ; that the official referee was right in holding that after the contract date had passed without any extension the duty of the plaintiffs was to complete the contract within a reasonable date ; and that all the terms of the contract, including cl. 28, continued to apply with such modifications as were necessary to make those terms applicable to the reasonable date.

Walker v. *London & North Western Ry.* (1876) 1 C. P. D. 518 distinguished :—

Held, further, that the plaintiffs were not entitled to recover damages from the corporation for breach of contract as the corporation had acted strictly in accordance with the contract ; nor could the plaintiffs recover damages for the action of the corporation in taking the works out of the plaintiff's hands as being an unlawful act and contrary to the provisions of the Courts (Emergency Powers) Acts, as they had not made any claim in their pleadings for damages on the ground that the action of the corporation was contrary to the provisions of those Acts ; that even if the corporation had committed an unlawful act by taking possession of property without having obtained the leave of the court under the Courts (Emergency Powers) Acts, damages for such unlawful act would not be referable to breach of contract but would be ascertained on a different basis, and might be merely nominal.

APPEAL from a decision of an official referee.

On November 28, 1938, the plaintiffs, Joshua Henshaw and Son, entered into an agreement with the defendants, the Rochdale Corporation, for the construction of an activated sludge plant at Roch Mills Sewage Disposal Works, Rochdale, for the sum of 50,290*l*. The contract provided, by cl. 29, that the work would be completed on or before March 1, 1940, unless the surveyor should certify in the manner provided for the extension of the time for completion, and, by cl. 31, that

C. A.

1944

JOSHUA HENSHAW AND SON *v.* ROCHDALE CORP.

in case any circumstances should delay or impede the execution of the works or any of them, the surveyor might from time to time, if he thought fit, without prejudice to the contract, certify in writing that the time for completing the works should be extended to such further time or times as he might deem reasonable and as he might set forth in such certificate or certificates. The contract was not completed on March 1, 1940, but no extension of time was applied for. The time for completion was, as the official referee found, waived because the work continued long after the date fixed for completion. By cl. 28 of the contract: " The contractor shall carry on " the work with due diligence and as much expedition as the " surveyor shall require and in case the contractor shall fail to " do so or shall neglect to provide proper and sufficient plant " and materials or to employ a sufficient number of workmen " to execute the works which he shall be ordered to execute " with due diligence or the despatch required or if the works of " this contract are in the judgment of the surveyor not being " carried on in all respects in strict conformity with the " specification and to his satisfaction or with such progress " as would enable them to be efficiently completed at the " time or in the manner required and specified the same shall " be intimated to the contractor by the surveyor and in case " he refuse to alter or amend any defective or unsatisfactory " work or materials or comply with any order he may so " receive to that effect or in case he shall fail in the observance " and performance of any of the provisions herein contained " or any part of his undertaking or shall become a bankrupt " or insolvent or shall liquidate by arrangement or shall " compound or propose any composition with his creditors " for the settlement of his debts or shall carry on or propose " to carry on his business under inspectors on behalf of his " creditors or shall commit any act of bankruptcy then the " corporation or their authorized officers shall have full power " without vitiating the contract or affecting the obligations " liabilities and responsibilities of the said contractor the whole " of which shall unless otherwise agreed on in writing to the " contrary continue to be in force and they are hereby " authorized after giving the contractor 48 hours' notice " in writing thereof to take the works wholly or in part out of " the hands of the contractor and to take possession of all the " plant tools and materials belonging to him and use or sell " the same as the absolute property of the corporation and

C. A.

1944

JOSHUA HENSHAW AND SON v. ROCHDALE CORP.

" to engage or employ any other person or persons and procure " all necessary materials and implements for the due execution " and completion of the said works ; and the costs and charges " incurred by them in so doing shall be ascertained and certified " by the surveyor and it shall be competent for the corporation " to deduct the amount of such costs and charges from any " money due or to become due to the contractor under this " contract or to call upon the sureties to make good the " amount which may become due to the corporation." The surveyor of the corporation wrote to the plaintiffs on September 1, 1941, requiring them to take steps to alter or amend their arrangements so that the contract might be completed satisfactorily and expeditiously. On September 11, 1941, the corporation gave the plaintiffs 48 hours' notice under cl. 28 that the corporation intended to take the work wholly out of the hands of the plaintiffs and to employ other persons to perform the same. On November 4, 1941, the plaintiffs began an action against the corporation claiming damages for breach of contract. The corporation, in their defence, relied on cl. 28 of the contract. The plaintiffs, in their reply, raised the plea that the action of the corporation in taking the works out of the plaintiffs' hands was in breach of the contract, and was unlawful and contrary to the provisions of the Courts (Emergency Powers) Acts, but they did not amend their claim for breach of contract. The action was remitted to be tried by an official referee who found the following facts : (*a*) The plaintiffs failed to carry out the works with the diligence and with as much expedition as the surveyor required ; (*b*) The plaintiffs failed to employ a sufficient number of workmen to execute the works, which they were ordered to execute, with due diligence or the dispatch required ; (*c*) The facts set out in the surveyor's letter of September 1, 1941 (except the allegation that the plantiffs neglected to provide proper and sufficient plant and materials) were true ; (*d*) The surveyor was honestly dissatisfied with the plaintiffs' conduct and had good grounds for being so dissatisfied ; (*e*) The plaintiffs had not by September 11, 1941, altered or amended their conduct or taken any reasonable or adequate steps to alter or amend their arrangements so that the contract might be completed satisfactorily or expeditiously ; (*f*) The plaintiffs' omission and neglect amounted to a refusal to alter or amend their conduct or to comply with the surveyor's order ; (*g*) The plaintiffs failed in their observance and performance of the provisions of cl. 28 of the contract; and (*h*) the corporation were entitled by cl. 28 to give the 48 hours' notice on September 11, 1941. It was contended by the plaintiffs before the official referee that cl. 28 ceased to have any application after the expiration of the time fixed by the contract for completion. The official referee however held that, after the contract date had been passed without any extension to a later fixed date named by the surveyor, the duty of the plaintiffs was to complete the contract within a reasonable date; and that all the terms of the contract continued to apply with such modifications as were necessary to make those terms applicable to the reasonable date The official referee, notwithstanding his holding that the plaintiffs were in default under their contract, nevertheless held that they were entitled to recover damages from the corporation on a basis agreed between the parties but not communicated to him by reason of the corporation having exercised their rights under cl. 28 without having first obtained leave to do so under the Courts (Emergency Powers) Acts. The corporation appealed against the judgment, and there was a cross-appeal by the plaintiffs against the official referee's holding that cl. 28 of the contract continued to be operative notwithstanding the expiration of the time originally fixed for completion.

Montgomery K.C. and *B. Ormerod* for the corporation. The official referee was wrong in awarding the plaintiffs damages for their failure to obtain the leave of the court under the Courts (Emergency Powers) Acts to serve the notice of September 11, 1941. The only claim put forward by the plaintiffs was for breach of contract. The highest at which the plaintiffs' claim could be put, by reason of the failure of the corporation to obtain the leave of the court under the Courts (Emergency Powers) Acts, was that the corporation had committed a tort the damages for which would be entirely different from damages for breach of contract and might be merely nominal. The plaintiffs never amended their claim so as to claim damages for a tort. Their claim was really for trespass and that was not sued for. [GODDARD L.J. referred to *Carr* v. *James Broderick & Co., Ld.* (1).] [They were stopped.]

(1) [1942] 2 K. B. 275.

Lynskey K.C. and *H. I. Nelson* for the plaintiffs. The corporation, in exercising their powers under cl. 28, were exercising their powers under the contract and were not claiming that the contract had been repudiated. The Courts (Emergency Powers) Acts prevented the corporation from acting on the powers conferred by cl. 28 without first obtaining the leave of the court, and what they did in giving the notice amounted to a breach of contract for which they are liable in damages. Clause 28 is a remedy given by the contract in respect of a failure of the plaintiffs to fulfil their obligations under the contract and the effect of that remedy is to defeat the rights which the plaintiffs have under the contract. With regard to the plaintiffs' cross-appeal, the corporation cannot rely on cl. 28 as the time fixed for the completion of the contract had expired before they served the notice under cl. 28. That clause is a forfeiture clause. It is stated in Hudson on Building Contracts, 6th ed., p. 412, that " in the " case of contracts giving a power of forfeiture for not proceeding with the work at the required rate, if the contract " date for completion has ceased to be binding, no forfeiture " for delay in progress can be made, for there is no period in " respect of which speed can be gauged. The clause, therefore, " can only be acted upon and enforced in respect of delay " when there is a date fixed for completion, and confers no " power of forfeiture after that date has passed or has ceased " to be applicable." *Walker* v. *London & North Western Ry.* (1) is cited as an authority for that statement.

No reply was called for.

Cur. adv. vult.

Feb. 1. SCOTT L.J. read the judgment of the court (SCOTT, LUXMOORE and GODDARD L.JJ.) which had been prepared by LUXMOORE L.J. The judgment stated the facts and continued : The official referee in his judgment declared that the plaintiffs were entitled to recover damages on a basis and on terms agreed between the parties and, consequent on such declaration, he ordered that the amount agreed by the parties in accordance with his declaration should be paid into a joint account of their solicitors pending an appeal. For some reason, which was not explained to us, the amount was not mentioned in the order. This is a serious defect, for it is difficult to understand how the order in its present form could be enforced in case of necessity.

(1) (1876) 1 C. P. D. 518.

The official referee's judgment proceeds on the footing that, notwithstanding the expiration of the time originally fixed for completion, cl. 28 continued to be operative. It was contended by the plaintiffs in the court below, and on the cross-appeal, that cl. 28 ceased to have any application after the expiration of the time fixed by the contract for completion. This contention was based on the following passage in Hudson on Building Contracts, 6th ed., p. 412: "In the case of "contracts giving a power of forfeiture for not proceeding with "the work at the required rate, if the contract date for "completion has ceased to be binding, no forfeiture for delay "in progress can be made, for there is no period in respect "of which speed can be gauged. The clause, therefore, can "only be acted upon and enforced in respect of delay when "there is a date fixed for completion, and confers no power of "forfeiture after that date has passed or has ceased to be "applicable." The learned author cites as authority for this statement the decision in *Walker* v. *London & North Western Ry.* (1). Although we think the statement quoted too wide, we see no reason to differ from the decision. It depended on the terms of the forfeiture clause which was made exercisable if the work was not prosecuted at the required speed, that is, the speed required to finish the work on the contract date. This is quite different from anything provided in the present contract. Clause 28 is not dependent on the contract being completed by the fixed date. It provides for the execution of the work with due diligence and as much expedition as the surveyor shall require, the employment of a sufficient number of workmen to execute the works with due diligence, and a number of other contingencies, all of which provisions are as much applicable to the fulfilment of the contract within a reasonable time as to its completion on the contract date. The official referee held that, after the contract date had been passed without any extension to a later fixed date by the surveyor, the duty of the plaintiffs was to complete the contract within a reasonable date, and that all the terms of the contract, including cl. 28, continued to apply with such modifications as were necessary to make those terms applicable to the reasonable date. In our judgment, the official referee was right in refusing to accept the plaintiffs' argument with regard to cl. 28, and we are, therefore, of opinion that the cross-appeal fails. We think the corporation were entitled to stop (as they

(1) 1 C. P. D. 518.

did) any further work being done by the plaintiffs on September 13, 1941.

It is clear from the findings of the official referee that the plaintiffs were guilty of serious breaches of contract at the date when the work was stopped, and that apart from the question under the Courts (Emergency Powers) Acts, hereafter referred to, the corporation had acted strictly in accordance with their contract. On this basis it is difficult to understand how the plaintiffs could possibly maintain an action for damages for breach of contract by the corporation who had, as already stated, acted in accordance with their contract. In this connexion it is material to observe that, both in the writ and in their statement of claim, the sole cause of action relied on by the plaintiffs is breach of contract by the corporation. The plaintiffs, in their reply, raise the plea that the action of the corporation in taking the works out of the plaintiffs' hands was in breach of the contract and was unlawful and contrary to the Courts (Emergency Powers) Acts, but there was no attempt to amend the writ or statement of claim by adding an additional or alternative claim for damages by reason of any action on the part of the defendants contrary to the provisions of those Acts. It was argued that the corporation committed a breach of contract and the plaintiffs were entitled to recover damages for that breach because they gave the notice under cl. 28 without having first obtained leave to do so under the Courts (Emergency Powers) Acts. It is difficult to follow this argument. The corporation, in giving the notice to stop the work, acted, as the official referee finds, in accordance with the terms of the contract. It may well be that if, after giving the notice, the corporation found it necessary to enter into possession of anything, leave to do so would have to be obtained under the Courts (Emergency Powers) Acts, and that, if they did enter into possession of any property without first having obtained leave to do so, they would be guilty of having committed an illegal act for which they would be liable to the plaintiffs in damages, but such damages would not be referable to breach of contract and would of necessity be ascertained on a different basis. Indeed, such damages might well be only nominal. The giving of the notice under cl. 28 was a step which was a necessary preliminary to any application under the Courts (Emergency Powers) Acts. Although this point does not appear to have been taken before the official referee, we are of opinion that it was not open to the plaintiffs on their pleadings to sue for or recover damages for any wrongful act of the defendants under the Courts (Emergency Powers) Acts. We were told that the sum placed by the corporation into the joint names of the solicitors to the parties was fixed on the basis of breach of contract alone without reference to any entry by the corporation without leave under the Courts (Emergency Powers) Acts.

In our judgment, the action, being based solely on breach of contract, ought to have been dismissed. We are, consequently, of opinion that the appeal should be allowed. In the circumstances any claim on the part of the plaintiffs for damages for wrongful entry into possession contrary to the statutory provisions remains open to them, but we think it right to add that, as at present advised, it seems impossible for them to claim with any hope of success that the corporation, in giving the notice stopping the work, re-entered into possession of land, for the land on which the works were being executed belonged to and was in the possession of the corporation. The plaintiffs had not possession of the land. Their only right was in the nature of a licence to enter on it to execute the works in accordance with the contract, and, in stopping the execution of those works under cl. 28 of the contract, the corporation were doing nothing more than revoking such licence. The works which had already been executed by the plaintiffs when the notice was given had become part and parcel of the land and were already in the possession of the corporation. With regard to the plant brought on to the site by the plaintiffs, the plaintiffs were expressly told they were at liberty to remove them. Consequently, the only property in respect of which there could have been any wrongful taking of possession contrary to the provisions of the Courts (Emergency Powers) Acts is such material as had been brought on to the land by the plaintiffs and had not at the date of the notice been incorporated in works already executed. We express no opinion on this matter, because it may be made the subject of litigation between the parties.

Appeal allowed: cross-appeal dismissed.

Solicitors for plaintiffs: *Hyman Isaacs, Lewis & Co., for Herbert J. Davis, Berthen & Munro, Liverpool.*

Solicitors for defendants: *Sharpe, Pritchard & Co., for H. Bann, Town Clerk, Rochdale.*

R. F. S.

C. A.

1944

Mar. 9, 10, 13, 17.

ALEXANDER AND ANOTHER *v.* TREDEGAR IRON & COAL COMPANY, LIMITED.

Mine—Coal mine—Haulage road—Obstruction—Horse-drawn damaged truck—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 47.

Master and servant—Common employment—Miner—Effect of Essential Work (*Coalmining Industry*) (*No.* 3) *Order,* 1941 (*St. R. & O.,* 1941, *No.* 2096), *para.* 4.

A damaged truck, legitimately on the haulage road while being horse-drawn to a place of repair, is not " an obstruction " within the meaning of s. 47 of the Coal Mines Act, 1911 (which puts on the owners of collieries the duty of seeing that " Every haulage " road shall be kept clear as far as possible of pieces of coal and " other obstructions "), even though owing to the negligence of the fireman responsible for the handling of the truck a train of trucks collided with it on the haulage road. So held by Goddard and du Parcq L.JJ., Scott L.J. dissenting.

The Essential Work (Coalmining Industry) (No. 3) Order (St. R. & O., 1941, No. 2096) does not destroy the contract of service between master and servant in undertakings scheduled under that order, and, therefore, does not operate to deprive the master of the defence of common employment where the death of one servant is caused by the default or negligence of a fellow servant.

APPEAL from Singleton J., at Newport (Mon.) Assizes.

The plaintiffs, the administratrices of the estates of Henry Alexander and Ernest William Andrews, repairers employed at the Ty Trist Colliery of which the defendants were the occupiers, claimed from the defendants damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, in respect of the deaths of the two men mentioned, the plaintiffs' father and husband respectively. On September 5, 1942, Alexander and Andrews were walking behind a damaged truck which was being horse-drawn up the main haulage road in the mine towards the pit bottom for the purpose of repair when a train of loaded trucks, part of the main haulage, descending on the same rails by the force of gravity, crashed into the truck and killed both men. It was found by the trial judge that the accident was caused by the failure of the fireman who was under the Coal Mines Acts in charge of the district, and had ordered the removal of the damaged truck, to telephone a warning that the truck was being sent up the line. It was contended for the plaintiffs that the truck was an " obstruction " of the haulage road within s. 47 of the Coal Mines Act, 1911, and that, therefore, the defendants had been guilty of a breach of their statutory duty to keep the haulage road clear. The defendant's case was that the truck was not an obstruction within s. 47, and that the claims were defeated by the rule of common employment. It was contended for the plaintiffs on the issue of negligence at common law that the defence of common employment was excluded, because the colliery was a scheduled undertaking under the Essential Work (Coalmining Industry) (No. 3) Order, 1941, (1), and, therefore, there was no longer freedom of contract between the defendants and their workmen. Singleton J. held that the truck was not an obstruction within the meaning of s. 47, and that the rule of common employment applied, and he gave judgment for the defendants. The plaintiffs appealed.

Paull K.C. and *Ryder Richardson* for the plaintiffs. The question whether the damaged truck was an obstruction within s. 47 of the Coal Mines Act, 1911, must be considered in the light of the fact that it was on a haulage road where anything occupying a part of the road, and so rendering the progress of trains difficult, impossible or dangerous, would, in fact, be an obstruction. " Pieces of coal " are mentioned in the section as representing the lowest form of obstruction. The rule of ejusdem generis cannot apply as there is no category : Maxwell on the Interpretation of Statutes, 8th ed., p. 289. In *Anderson* v. *Anderson* (2), Lord Esher said : " Prima facie " you are to give the words their larger meaning, " unless you find something which plainly shews that " they were intended to be read in a more restricted " sense." In *Reg.* v. *Hadfield* (3) an ordinary train which, by reason of a criminal alteration of signals, had been slowed down, was held to be an " obstruction." Kelly C.B. said : " I think that there was as much an obstruction as if a log " of wood had been placed across the rails." The doctrine of common employment does not apply. It is based on a fiction, namely, that the injured workman was free to

(1) By Essential Work (Coalmining Industry) (No. 3) Order, 1941, para. 4 : " Subject as here- " inafter provided, where a person " carries on a scheduled under- " taking the following provisions " shall apply . . . . (*b*) a person " employed in the undertaking " shall not leave his employment " except with . . . . permission [of " a National Service Officer]."

(2) [1895] 1 Q. B. 749, 753.

(3) (1870) L. R. 1 C. C. R. 253, 255.

C. A.

1944

ALEXANDER
v.
TREDEGAR
IRON &
COAL CO.,
LD.

contract on whatever terms he chose, and could put an end to his contract of service if he did not care to continue working with a careless or unskilful fellow-workman: *Priestley* v. *Fowler* (1). The Essential Work Orders have put an end to freedom of contract between employer and employee, and the basis of the doctrine of common employment has, therefore, gone: see *Tozeland* v. *West Ham Union* (2). [*Bartonshill Coal Co.* v. *Reid* (3); *Smith* v. *Steele* (4); and *Radcliffe* v. *Ribble Motor Services Ld.* (5) were also referred to.]

Long K.C. and *Arthur Warren* for the defendants. This is not the case of men who had been directed into employment. Both the deceased men had entered into contracts of employment years before the Essential Work Orders came into operation, and it is conceded that up to the moment when those orders came into force they were subject to the terms of their contracts, and to the application of the doctrine of "common employment." [He was stopped on this point.] It must be conceded that what happened in this case resulted in an "obstruction" in the strict, mechanical sense, but the word is not so used in s. 47. "Obstruction" in the section has to be examined in the light of what an ordinary person speaks of when he uses the word, viz., "allowing something to "be on the haulage way which was not there for the purpose "for which the haulage way was normally used." There was nothing wrong in the damaged truck being brought on the haulage way even during haulage hours, but the fireman was negligent in not giving the required signal. Section 47 deals with the condition of the haulage way, not with the control of the traffic on it. So regarded, its application is simple, but difficulties at once occur if one seeks to read into it a condition for controlling the haulage way. Even if the truck was an obstruction, the defendants are relieved of liability by s. 102, sub-s. 8, of the Act.

Cur. adv. vult.

March 17. SCOTT L.J. I have the misfortune to be in a minority and in those circumstances I will ask GODDARD L.J. to deliver judgment first.

(1) (1837) 3 M. & W. 1, 6.
(2) [1906] 1 K. B. 538, 542.
(3) (1858) 3 Macq. 266.
(4) (1875) L. R. 10 Q. B. 125.
(5) [1939] A. C. 215.

C. A.

1944

ALEXANDER
v.
TREDEGAR
IRON &
COAL CO.,
LD.

The following judgments were then read:

GODDARD L.J. This is the judgment of myself and DU PARCQ L.J. In our opinion, the judgment of Singleton J. was right on all points. The evidence showed that there is nothing improper in hauling a truck in need of repair by means of a horse along the haulage way during working hours, provided a signal is given by a telephone communication, or otherwise, to the engine driver so that the latter may not send down a journey of trucks while the damaged vehicle is on the road, or that he may tell those in charge of the damaged vehicle to wait until the line is clear. We do not think that s. 47 has any application to a truck that is on the haulage way in these circumstances. The danger only arises by reason either of a failure to communicate with the engine driver or of a disregard of the communication by the engine driver, who might send down a journey in spite of being warned that a truck is being hauled up, or by the man in charge of the truck disregarding the warning of the engine driver that a journey was coming or about to come down. In our opinion, the argument of Mr. Long, that the section is not a traffic regulation, is right. It is intended to deal with the condition or state of the haulage way. A truck left on or across the line, either negligently or deliberately, would, we think, fairly come within the meaning of "obstruction," as used in the section. It would then be as much an obstruction as a piece of coal or a baulk of timber, but a section which requires the way to be left clear of pieces of coal or other obstructions does not appear to us to be intended to deal with the case of a truck or line of trucks which is being legitimately moved along the rails, but, owing to a failure to signal or to a disregard of signals, causes a collision. The same conclusion would result from invoking the rule of construction known as the ejusdem generis rule or as the rule noscitur a sociis, a rule which, no doubt, ought to be applied with caution, because it implies a departure from the natural meaning of words in order to give them a meaning which may or may not have been the intention of the legislature: see per Rigby L.J. in *Smelting Co. of Australia Ld.* v. *Inland Revenue Commissioners* (1), but the presence of the words "pieces of coal" seem to us to indicate quite clearly the sort of obstruction at which the section was aimed. We are bound to say that we do not think, that, if one speaks of a train being wrecked by an obstruction on the line, it would

(1) [1897] 1 Q. B. 175, 182.

C. A.
1944

ALEXANDER
v.
TREDEGAR
IRON &
COAL CO.,
LD.

Goddard L.J.

be thought to be an appropriate way of describing a collision between two trains moving in opposite directions on the same set of metals. On this point, therefore, we agree entirely with the learned judge, but, if the section did apply to this state of facts, it is equally clear that s. 102, sub-s. 8, would afford no defence. If it were a breach of statutory duty, it is a breach of an absolute duty cast on the employer, and no one can say that the breach was unavoidable.

The other point that arises is that it is submitted that the doctrine of common employment cannot arise in the case of any employment to which the Essential Works Orders apply, inasmuch as there is no longer freedom of contract between master and servant. For this purpose there is no difference between the order which applies to the coal mining industry and that dealing with any other essential employment. In the present case the workman had not been directed to this particular employment. He had, in fact, been in the service of the defendants for many years and had never applied to leave it. This, in our opinion, is immaterial. The suggested reason for saying that the doctrine does not apply is equally applicable, as it seems to us, to a man who is ordered to work for a particular employer and to one who, being in the service of an employer, cannot leave without permission. It is perfectly true that it has been said in more than one of the older cases on the subject that, if a workman finds, or thinks, that he is exposed to risks from rash or unskilful fellow-servants, he can leave the employment, but that, we think, is only an attempt to make appear reasonable a doctrine that most modern lawyers regard as irrational. It is far too late, however, now to pray in aid any of these supposed considerations. Whether one calls it a rule or a presumption, it is a rule or presumption of law and can be excluded by nothing less than an express agreement: see per Scrutton L.J. in *Fanton* v. *Denville* (1), where he cites with approval a passage, at p. 126 of the 7th ed. of Salmond on Torts, (9th ed., p. 107). Again, in *Radcliffe* v. *Ribble Motor Services* (2), Lord Macmillan said that the assumed facts are sheer fiction, yet the rule of law persists notwithstanding that its original ratio has long ceased to be regarded as tenable. It is to be remembered that when passing, on more than one occasion, legislation that has mitigated the doctrine,

(1) [1932] 2 K. B. 309, 325.

(2) [1939] A. C. 215, 234.

Parliament has refrained from abolishing it, and it is, therefore, the plain duty of the courts, however much they may regret that it ever became a rule, to apply it when the facts require it. It would only be possible in this case to escape from the rule were it to be held that the Essential Works Orders destroyed the contract of service. In our opinion, it is impossible so to hold. The order imposes certain conditions and restrictions on the contract. It makes it an offence for a man to refuse to enter into a contract of service with an employer to whom he is directed or for an employer to refuse to employ a man whom he is directed to employ. Equally, it makes it an offence for a man to leave his employment, or, with certain exceptions, for an employer to discharge him without the permission of an official of the Ministry of Labour, but, once a workman is working for an employer, he must, in our opinion, be considered as working under a contract of service and the ordinary terms of such a contract must apply thereto, except in so far as they are abrogated by the order. The doctrine of common employment is a part of the law relating to the vicarious liability of a master for the acts of his servants. While he is liable for the injuries caused by the negligence of his servant he is not liable if the injured person is a fellow servant, provided the employment is one which involves, necessarily and naturally, the exposure of one to the risk of negligence in another : see *Radcliffe* v. *Ribble Motor Services, Ld.* (1). The reasons justifying the vicarious liability of a master to others for the negligent act of his servant are that the injury may be deemed to be caused either by the want of care in choosing competent servants or in the superintendence or control of their work. This presumption or rule is just as irrefutable as that of common employment, but if it were held that because the Essential Works Orders restrict, or even destroy, freedom of contract the doctrine of common employment no longer applied, we do not see why the vicarious responsibility of an employer to third parties should not also be ended. He could say, perhaps with absolute truth, that, had he been left free, he would never have engaged the particular servant who had proved to be negligent or unskilful, or would have got rid of him before he had committed the particular act of negligence. In our opinion, the learned judge was right on this point also, and we would dismiss the appeal.

(1) [1939] A. C. 215.

C. A.
1944
ALEXANDER v. TREDEGAR IRON & COAL CO., LD.

SCOTT L.J. [After stating the facts]: The first question is whether the horse and damaged tram, in the position in which they were on the haulage way, constituted an obstruction within the meaning of the section. That the journey of trams was obstructed in its lawful passage along the main haulage road cannot be gainsaid, but is that kind of obstruction within the meaning of the section? The learned judge held it was not. He thought the section only meant things left on the track, like props or large lumps of coal. Much argument was addressed to us on the applicability to the wording of the section of the so-called ejusdem generis rule, almost as if it was a rule of substantive law and as if the sole question on the section was whether the rule applied or not. In my opinion, that rule has been stretched beyond its limits, elastic though it may be, and as a result it is almost as likely to mislead as to elucidate. I cannot see that it has any application to s. 47. If one tries to apply it, one is at once met with the difficulty, that, there being only one "species," viz. pieces of coal, there is no basis for formulating a "genus." The section may not be a very good specimen of the draughtsman's art, but its meaning seems to me plain. I construe it as "every "haulage road shall as far as possible be kept clear of anything "which will, or may, obstruct the working of the haulage "system, e.g. pieces of coal." The reason they are specifically mentioned seems to me to lie in the fact—well known to anybody familiar with coal mines—that the jolting of trams filled with large coal to the top is liable occasionally to cause large pieces to fall out over the edges of a tram on to the track, but the stress of the imperative command of Parliament is on the word "obstruction." The section is in the group of sections which deal with safety, and, in my opinion, it should be so interpreted, if it presents any ambiguity, as to promote safety. This interpretation, I think, accords with the principles enunciated by Lord Blackburn in *River Wear Commissioners* v. *Adamson* (1), and per Tindal C.J., in *Sussex Peerage Case* (2): "But if any doubt arises from the terms employed by the "legislature, it has always been held a safe mean of collecting "the intention, to call in aid the ground and cause of making "the statute, and to have recourse to the preamble, which, 'according to Chief Justice Dyer, *Stowel* v. *Lord Zouch* (3),

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(1) (1877) 2 A. C. 743, at pp. 763–765.

(2) (1844) 11 Cl. & F. 83, at p. 143.

(3) Plowden, 369.

" is ' a key to open the minds of the makers of the Act, and " ' the mischiefs which they intended to redress '."

My brethren do not agree with me. They think the word " obstruction " must be construed as ejusdem generis with " pieces of coal," but that narrow interpretation seems to me to ignore the indications of what Parliament had in mind, afforded by the Act & Coal Mines Regulations, which have a statutory force. The haulage road in question was, as is usual, a single line railway, and the essential need in the cause of safety was to prevent the passage of " blind " trains of trams, i.e. with no human being walking at the head of the train, being obstructed by unseen and unexpected obstacles. Having regard to the construction put on the section by my brethren, I, of course, concede that its language is not free from ambiguity, but, equally, I cannot think that it is clear in their sense, and, if it is ambiguous, I venture to think that my " safety " interpretation is more consonant with principle than theirs. I cannot think that the " penal " principle of interpretation, as used by Mr. Long, has any application to s. 47. If, then, the section be construed as forbidding " obstructions " in general, the only question of interpretation which remains is whether at the time and place of the accident the horse and damaged tram constituted an " obstruction." It cannot be gainsaid that the duty of the fireman was to keep the line clear, or, conversely, to take all possible steps to prevent its being not clear, i.e. obstructed. He ought to have telephoned to ask whether the line up to the pit bottom would be clear for the damaged tram, but he did not. As he could not with safety send the gang forward without that assurance, he committed a grave breach of duty in ordering the men to take the horse and tram forward, thereby, in the event, obstructing the descent of the oncoming journey of fourteen heavily laden trams full of stone. Indeed he committed two breaches of duty, one of omission, the other of commission. If he had ordered the tram to any point on the main road to the pit bottom above the junction where the descending train would have quitted the main road, and then left it there, calling his men and horse off, can it be doubted that it would have been an obstruction within the section? If so, what difference does it make, on the issue of interpretation, that the tram was moving and not stationary?

On the other issues in the appeal I agree with my brethren, but for the reasons given above I have come to the conclusion,

C. A.
1944

ALEXANDER
v.
TREDEGAR
IRON &
COAL CO.,
LD.

Scott L.J.

respectfully differing from them, that there was a breach by the defendant company of their statutory duty, and, consequently, that the defence of common employment does not apply. I cannot, however, refrain from drawing attention to the unjust paradox of the defence of common employment as the law is to-day in regard to such common law negligence by the dead fireman as there was in this case. Under s. 14 of the Coal Mines Act, 1911, and regs. 49 to 62 of the Coal Mines Regulations, 1913 (St. R. & O., 1913, No. 748), it was his duty, throughout the "district" of the mine assigned to him, to see to the safety of every workman under his charge. and in this he was, in truth, the alter ego of the company. It was his negligence in this very respect which cost the lives of these two men. Yet the case law binds this court to say that, however much he was in command of the district for safety purposes, he was a fellow servant in common employment with them so that no action for mere negligence at common law can lie against the company which appointed him to his command. I call it an unjust paradox because the men were under a statutory duty to obey their fireman's orders. It was his duty under reg. 58 to stop the use of the damaged tram (because it, like the other things there mentioned, was part of the "apparatus" of the mine), and I think it follows that he was entitled to order the men under him to take it to the pit bottom that it might go up to the surface for repair. But, also, it was his duty to use the telephone: reg. 103. It was his duty to give the sound signals up the road under reg. 98 to say something was coming up. It seems to me wrong that the common law should deprive the men thus working under him, or their dependants, of all legal remedy because, forsooth, they were in "common employment" with the very man whose orders they were bound to obey. The case, in short, raises in a peculiarly direct and startling form the old question of legislative reform which still calls for consideration. The appeal should, in my view, be allowed, the judgment below set aside, and a new trial ordered for the assessment of damages.

Appeal dismissed.

Solicitors for plaintiffs: *Theodore Goddard & Co., for T. S. Edwards & Son, Newport (Mon.).*

Solicitor for defendants: *A. J. Prosser, Cardiff.*

A. W. G.

AUSTIN *v.* GREENGRASS.

1944.
March 16.

Landlord and tenant—Rent restriction—Rent book—Statement of standard rent—Part of dwelling-house let—Standard rent of that part not known—Rent Restrictions Regulations, 1940 (*St. R. & O.*, 1940, *No.* 238), *reg.* 4 ; *sch.* II.

The landlord of a dwelling-house, who had let to a tenant on a weekly tenancy the ground floor of the house as a separate dwelling-house to which the Rent Restrictions Acts applied, used a rent book in respect of the ground floor which contained a statement of the standard rent of the whole house, but no notice of the standard rent of the ground floor, of the amount of which the landlord was unaware. Neither the landlord nor the tenant had applied to the county court for the determination of the standard rent under s. 11 of the Rent and Mortgage Interest Restrictions Act, 1923. On a prosecution of the landlord under s. 14, sub-s. 3, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, for using a rent book which did not conform to the Rent Restrictions Regulations, 1940, since the notice in the rent book did not contain the standard rent, the magistrate held (1.) that there was no standard rent of the premises until it had been ascertained by an application under s. 11, and (2.) that, if there were such a standard rent, as the landlord was unaware of it, the requirement of the regulations did not apply :—

Held, that there was a standard rent of the ground floor before the amount thereof had been determined by the county court ; and that, assuming that the county court would have no jurisdiction to determine the standard rent of the ground floor before it was let, the landlord could have complied with the regulations by applying forthwith on the letting of that floor to the county court under s. 11 to determine the standard rent and stating in the rent book the amount of the standard rent of the whole house, the fact that he had made the necessary application under s. 11, that on the determination of the standard rent he would insert the amount thereof in the rent book, and that as soon as the standard rent had been determined the rent paid in the meantime would be adjusted.

CASE stated by metropolitan magistrate.

At a court of summary jurisdiction sitting at Clerkenwell an information was preferred by the appellant, acting on behalf of the St. Pancras borough council, under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and the Rent Restrictions Regulations, 1940, against the respondent for that she, in May, 1943, being the landlord of the ground floor of No. 41, Grafton Road, London, N.W., that floor being a dwelling-house to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, applied, and being let by her to one Currie at a rent of 17*s.* 6*d.* a week, the respondent paying the rates, did use a rent book which did not conform to the regulations in that it did not contain a notice in the appropriate form set out in the second schedule to the regulations (1). At all material times the respondent used a rent book in respect of the letting of the ground floor which contained the statement :—" The standard rent of the whole house is 78*l.* per " annum, the tenant paying the rates." There was no notice in the rent book of the standard rent of the ground floor. The respondent did not know what was that standard rent and it had not been determined by the county court. The magistrate held that, in default of agreement between the parties, until the amount of the rent had been apportioned under s. 11 of the Rent and Mortgage Interest Restrictions Act, 1923, there was no standard rent of the ground floor, but, if there was a standard rent of the ground floor at the relevant date, then, since the landlord was unaware of it, the requirement in the Acts and regulations did not apply. The appellant appealed.

Garland for the appellant. The opinion of the magistrate that at the material time there was no standard rent of the ground floor is incorrect. There is always a standard rent of a dwelling-house which is controlled under the Rent Restrictions Acts. If the rent agreed exceeds the standard rent by more than the amount permitted by the Acts, the excess is irrecoverable from the tenant: s. 1 of Increase of Rent, etc. Act, 1920; but if there were no standard rent until the amount is determined by the county court an excess could be recovered from the tenant. The standard rent, however, may not be known until an application for its determination is made to the county court under s. 11 of the Act of 1923, the determination in the case of part of a house being by apportionment: s. 5 of the Increase of Rent, etc., Act, 1938. The rent book must contain a notice in the appropriate form, one of the essential incidents of which

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(1.) By reg. 4 of the Rent Restrictions Regulations, 1940: " Every rent book or other similar " document used by or on behalf " of any landlord in respect of any " dwelling-house to which the " principal Acts apply shall con- " tain a notice in the appropriate " form set out in the second " schedule to these regulations " . . . . of all the matters referred " to in the said form."

Par. 4 of the appropriate form in the second schedule reads :— " The standard rent of the " premises is . . . . per . . . ."

is a statement of the standard rent: see reg. 4 of the Rent Restrictions Regulations, 1940, and par. 4 of the appropriate form, and if a landlord uses a rent book which does not conform to that requirement he commits an offence: see s. 14, sub-s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The offence under s. 11 of the Act of 1920 committed by a landlord who fails to supply a tenant with a statement of the standard rent within fourteen days of a request in writing is limited by the words "without "reasonable excuse," but there is no such limitation in s. 14, sub-s. 3, of the Act of 1933. If the landlord does not know what is the standard rent, he is bound at once to apply to the county court under s. 11 of the Act of 1923 to determine that rent, and to state that fact in the rent book. There is no obligation on the tenant to ascertain the standard rent.

A. A. Pereira for respondent. There is no obligation on a landlord to state the standard rent in a rent book until the tenancy is created: see s. 6 of the Act of 1938. Further, a landlord cannot apply to the county court under s. 11 of the Act of 1923 to determine the standard rent of part of a dwelling-house until a tenancy of that part is created, since up to that time that part is not a dwelling-house to which the Acts apply. The Rent Restrictions Acts do not affect any dwelling-house or part of a dwelling-house which is not let: see s. 12, sub-s. 1 (*a*), and sub-s. 2, of the Act of 1920. When the rent book is used during the first week of the tenancy, the landlord cannot insert in it a statement of the standard rent when he does not know what it is and he cannot be convicted of failing to do an act which at the material time he is unable to perform: [He referred to *Rex* v. *Marylebone County Court Judge* (1)].

Garland replied.

The judgment of the court (VISCOUNT CALDECOTE, C.J., MACNAGHTEN and CASSELS JJ.) was delivered by

MACNAGHTEN J. In our opinion, the view of the magistrate that there was no standard rent of the ground floor within the meaning of the Rent Restrictions Acts was not correct. The ground floor was let separately from the rest of the house, and so, being a separate dwelling-house within the meaning of the Rent Restrictions Acts, it had a standard rent although the

(1) [1923] 1 K. B. 365.

amount of that rent could only be determined by an application to the county court under s. 11 of the Act of 1923. That there was such a standard rent is plain, because, if and when the court is asked to apportion the standard rent of the whole house so as to ascertain the standard rent of the ground floor, that determination by the county court judge would relate back to the day when Mr. Currie's tenancy of the ground floor began. If the rent which Mr. Currie has paid to the respondent exceeds the standard rent by more than the amount permitted under the Acts he will be entitled to recover that excess from the date of the beginning of the tenancy. There was, therefore, a standard rent of this ground floor tenancy separate from the standard rent of the whole house.

In our judgment, the magistrate was also wrong in holding that, assuming there was a standard rent of the ground floor at the relevant date, then, since the landlord was unaware of what it was, the requirement in the Rent Restrictions Regulations, 1940, to give notice of the standard rent in the rent book did not apply. This obligation on the landlord is one with which he is bound to comply. He can do so by applying to the county court judge to determine the standard rent. Counsel for the respondent contended that his client could not apply to the county court to determine the standard rent until he had let the ground floor to Mr. Currie. Assuming that the county court judge would be without jurisdiction to determine the standard rent of these premises before they were let, there is no difficulty in the respondent stating in the rent book that the standard rent of the whole house was so much ; that, on letting the part of the house in question as a separate dwelling-house, he had applied to the county court judge to apportion the rent in order to fix the amount of the standard rent of the part so let ; that, as soon as the county court judge had done so, he would insert the amount of the standard rent in the rent book ; and that the rent paid in the meantime would be adjusted once the standard rent had been ascertained. The case must be remitted to the magistrate with this expression of the opinion of the court so that he may deal with the case accordingly.

Appeal allowed.

Solicitors for appellant : *W. T. Ricketts & Son.*
Solicitors for respondent : *Walter A. Jennings.*

C. G. M.

C. A.

1944
March 9.

CORPORATION OF FOREIGN BONDHOLDERS *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Income tax—Charity—Corporation of Foreign Bondholders—Object to protect interests of holders of public securities—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 37, *sub-s.* 1 (*b*).

The objects of the Corporation of Foreign Bondholders, incorporated by a private Act, were "to watch over and protect "the rights and interests of holders of public securities wherever "issued, but especially of foreign and colonial securities issued in "the United Kingdom," and other objects subsidiary thereto. The control of the corporation, which had no shareholders, was vested in a council of twenty-one members, with power to increase their number to thirty, seven members retiring annually. Of those appointed in their place, two were appointed by the Central Association of Bankers, two by the London Chamber of Commerce, and three by the Council, two at least of whom were required to be bona fide holders of foreign bonds to a nominal value of 5,000*l.* On the winding-up of the corporation, its surplus assets were to be devoted to the objects for which the corporation was established or to similar or analogous objects in accordance with a scheme settled or sanctioned by the Board of Trade. The corporation did not give market advice, but placed its services at the disposal of any member of the public, whether a bondholder or not, without fee. The corporation derived its income from dividends, rents and agency and other commissions. In some cases, the corporation received remuneration for work done as agent for a debtor government. In no case did it charge a fee for negotiating with foreign debtors, but, as part of the arrangements which it negotiated, it might in some cases recover its expenses:—

Held, that the corporation was not "a body of persons established "for charitable purposes only" within the meaning of s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918.

Decision of Macnaghten J. ante p. 63 affirmed.

APPEAL from Macnaghten J. (1).

The facts in regard to the formation of the Corporation of Foreign Bondholders as incorporated by the Corporation of Foreign Bondholders Act, 1908, and the objects for which it was formed and which it performed are sufficiently set out in the headnote and are more fully stated in the report of the hearing before Macnaghten J. (1). The council of the corporation made a claim before the Special Commissioners of Income Tax for the years 1934/5 to 1939/40 for exemption from income tax in respect of investment income under the provisions

(1) Ante p. 63.

C. A.
1944

Corporation of Foreign Bondholders v. Inland Revenue Commissioners.

of s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, contending that the objects of the corporation were specific and beneficial to the public and that the corporation was a " body of persons " . . . . established for charitable purposes only " within the meaning of the paragraph. The commissioners held that the safeguarding of a particular section of the community, namely, foreign bondholders, was not a charitable purpose, and, therefore, that the corporation was not " a body of " persons established for charitable purposes only." Macnaghten J. dismissed an appeal from this decision. The corporation appealed.

Tucker K.C. and *Scrimgeour* for the corporation. The name of the corporation is misleading, but it exists only as a trustee of its funds for charitable purposes as in *In re Manchester Royal Infirmary* (1). The corporation is a charity within the fourth category laid down by Lord Macnaghten in *Income Tax Special Purposes Commissioners* v. *Pemsel* (2), namely, bodies or trusts for purposes, other than those specified in the earlier categories, beneficial to the community. The trusts are not the less charitable because they benefit the rich as well as the poor. For a body to be charitable it must not be run as a commercial venture nor for the members' own pleasure: see *In re Pitt Rivers* (3) and *In re Nottage* (4). The corporation does not offend in either of these respects, and its trusts, though beneficial to bondholders, involve in their execution the benefiting of the community. It is sufficient that the trusts are for the benefit of a considerable section of the community, the section being one in which any person may find himself a member either by accident or at his own volition. Lastly, in deciding whether a trust is beneficial to the community, the court must look beyond the immediate objects of the bounty and see whether the ultimate result is to benefit the community: *In re Grove-Grady* (5), *Verge* v. *Somerville* (6), *In re Foveaux* (7) and *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* (8). The preservation and protection of foreign investments made in this country is for the benefit of the community, as has been specially demonstrated during the present war.

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(1) (1889) 43 Ch. D. 420, 428.
(2) [1891] A. C. 531, 583.
(3) [1902] 1 Ch. 403.
(4) [1895] 2 Ch. 649.
(5) [1929] 1 Ch. 557.
(6) [1924] A. C. 496.
(7) [1895] 2 Ch. 501.
(8) [1928] 1 K. B. 611.

Sir David Maxwell Fyfe S.-G., J. H. Stamp and R. P. Hills for the Crown were not called on to argue.

LORD GREENE M.R. The object of the corporation may, I think, summarily be stated in this way. It exists to enable investors of a certain limited class to protect, so far as possible, their investment, and to get their money back, or as much of it as can be extracted, from a reluctant foreign government. That being the object of the corporation, nobody can suggest that the investors themselves are to be regarded in any sense as doing anything more than looking after their private interests, yet it is said that this corporation, the object of which is to assist them in doing so, is established for charitable purposes. Mr. Tucker, in an engaging argument adorned with excursions into elementary economics, has endeavoured to put this body before us as one which exists for the public purpose of protecting the foreign investments of this country and thereby doing a public good. It cannot, I think, be disputed that, in the matter of helping the investor in foreign bonds and applying whatever persuasion can be brought to bear on defaulting foreign governments, the country is benefited by the operations conducted by this corporation, but it is quite untrue to say that a body which is established to protect private investors becomes a charity because one of the results of its operations is to do something which is beneficial to the State. In my opinion, the facts have only to be understood for the question raised by this appeal to be answered, and it must be dismissed, with costs.

MACKINNON L.J.: I agree.

LUXMOORE L.J.: I also agree.

Appeal dismissed.

Solicitors: *Slaughter & May; Solicitor of Inland Revenue.*

H. C. G.

C. A.

1944

March 20, 21, 22.

SUTCH *v.* BURNS.

Appeal—Court of Appeal—Hypothetical case—Jurisdiction of court to entertain.

In an action, under s. 10, sub-s. 1, of the Road Traffic Act, 1934, by a widow against the underwriter of a policy of insurance relating to a motor vehicle in respect of the death of her husband arising out of the use of the vehicle on a road, the defendant conceded that the case should be treated as if the policy was one complying with the requirements of part II. of the Road Traffic Act, 1930, so as to cover the liability of the driver of the vehicle, which, in fact, it did not. The defendant contended that, even on that assumption, he was not liable on the facts. Atkinson J. gave judgment for the plaintiff, and the defendant appealed:—

Held, that, as the action was based on a hypothetical policy of insurance, it could not be entertained by a court of law.

Glasgow Navigation Co. v. *Iron Ore Co.* [1910] A. C. 293 applied.
Decision of Atkinson J. [1943] W. N. 196 reversed.

APPEAL from Atkinson J. (1).

On March 1, 1937, the defendant and other underwriters issued to Convoys, Ld., a policy of insurance (motor vehicle) which indemnified the company against third-party risks arising out of the use of a motor vehicle, the property of the company, on a road, including accidental loss of life or bodily injury, except in respect of . . . . "(*a*) any person . . . . "being driven in . . . . the insured vehicle." The policy did not indemnify the permitted driver of Convoys, Ld. On November 12, 1937, during the currency of the policy, Welling, a driver of Convoys, Ld., drove the insured vehicle to premises of Mono Containers, Ld., where he delivered rolls of paper. Welling was asked by the foreman of Mono Containers, Ld., to load up other rolls of paper and take them to another branch of their works. Welling agreed to do this, the rolls were loaded on the vehicle, and certain employees of Mono Containers, Ld., one of whom was named Sutch, mounted the vehicle as passengers. On the way to his destination Welling turned the vehicle rather hastily with the result that Sutch fell on the highway, receiving injuries from which he died, The plaintiff, the widow of Sutch, brought against Welling and Convoys, Ld., an action in which judgment was given by Wrottesley J. for her against Welling for 1,425*l.* damages under the Fatal Accidents Acts and 225*l.* damages under the Law Reform (Miscellaneous Provisions) Act, 1934, but judgment was given for Convoys, Ld., against her. The judgment against Welling not being satisfied, the plaintiff

(1) [1943] W. N. 196.

brought the present action against the defendant underwriter under s. 10, sub-s. 1, of the Road Traffic Act, 1934, to recover the sums payable under the judgment against Welling. On it being ascertained that the policy did not indemnify Welling as a permitted driver and that the exception of passengers was not in conformity with s. 36, sub-s. 1 (*b*) (ii.), of the Road Traffic Act, 1930, the defendant conceded that the action should be treated as if the underwriters had given Convoys, Ld., a policy which would comply with the requirements of Part II. of the Road Traffic Act, 1930. The defendant contended that such a policy would not cover the present case since the driver took the vehicle on the road, without the authority of the policy-holder, for his own purposes, and was, therefore, not " permitted " to use a motor vehicle on a road within s. 35 of the Act of 1930. Atkinson J. gave judgment for the plaintiff. The defendant appealed.

Humfrey Edmunds for the defendant.
Montague Berryman for the plaintiff.

During the argument du Parcq L.J. called attention to *Glasgow Navigation Co.* v. *Iron Ore Co.* (1) and *Sun Life Assurance Co. of Canada* v. *Jervis* (2).

SCOTT L.J. The question which the court is asked to determine does not arise on any policy in fact issued, for the court is asked to assume that if the policy does not comply with the requirements of Part II of the Road Traffic Act, 1930, it should be treated as if it were amended in whatever manner might be necessary to ensure compliance. There is therefore no real issue before the court and no lis between the parties. Atkinson J. ought not to have heard the case and ought to have dismissed the action. The appeal must be allowed and the action dismissed.

LUXMOORE L.J. I agree.

DU PARCQ L.J. I agree.

Appeal allowed.

Solicitors for defendant : *Barlow, Lyde & Gilbert.*
Solicitors for plaintiff : *Gisborne & Co.*

(1) [1910] A. C. 293, 294. (2) [1944] W. N. 91.

W. L. L. B.

C. A.

1944
Feb. 28.

THOMPSON *v.* PARK.

Contract—Licence to use premises—Breach—Forcible re-entry by licensee —Trespass—Interim injunction.

By an agreement between T. and P., each of whom owned a school, the schools were amalgamated and T. licensed P. to enter, with some twenty-five boys, on his (T's) school premises. Differences having arisen, T. informed P. that, after the end of the Christmas term, 1943, he would not allow P. to return with his boys and requested him to remove his furniture from T.'s premises, and, on P. failing to do so, removed it himself. In January, P. forcibly re-entered the premises :—

Held, that, even on the assumption that T. had been guilty of breach of contract, P. was only a licensee, and that, as T. had revoked the licence, P. was a trespasser and had no right to re-enter the premises or remain on them, his remedy, if any, being for damages for breach of contract, and an interim injunction must be granted to restrain P. from further trespass and ordering him to remove his furniture and pupils.

Appeal from Asquith J. in chambers.

The plaintiff, a schoolmaster, kept a preparatory school at Broughton Hall, Eccleshall, Staffordshire, which he owned. The defendant, also a schoolmaster, kept a preparatory school, Brockhurst, at Church Stretton, Shropshire. By an agreement in writing between the plaintiff and the defendant, it was arranged that, as from the beginning of the autumn term, 1942, the schools should be amalgamated, and that from twenty to twenty-five places should be reserved for the defendant's boys at Broughton Hall. The agreement was expressed to be for the duration of the present war. Differences arose, and a notice to determine the agreement was given by the defendant and accepted by the plaintiff. The plaintiff thought that this determined the agreement, but the defendant thought it was only provisional and did not do so. The plaintiff took up the attitude that the defendant must leave the premises, but as the defendant had been unable to find other accommodation, he allowed him to remain for the autumn term, 1943, but informed him that he must leave at the end of the term. At the end of the term, as the defendant showed no inclination to leave, the plaintiff wrote to the parents of the defendant's pupils that he would be unable to receive them back at Broughton Hall after Christmas. He also removed the defendant's furniture and equipment and stored it in outbuildings. On January 15, 1944, the defendant, accompanied by his brother and twelve men, arrived at Broughton Hall and tried to enter at the back door. Finding their way disputed, they went round to the front door and entered the house. They took off or forced the locks of some thirty-two rooms, and they also disconnected a pump so that the premises were left without water. The plaintiff sought an interim injunction to restrain the defendant from trespassing and continuing to trespass on the plaintiff's house, and a mandatory injunction to leave Broughton Hall, but this claim was refused by Asquith J. The plaintiff appealed.

Beney K.C. and *M. O. Stranders* for the plaintiff.
Morris K.C. and *Herbert Malone* for the defendant.

GODDARD L.J. If an interim injunction is not granted by a judge in chambers, it is very seldom that this court grants one, but in this case the court is agreed that it is essential that the injunction should go. [His Lordship stated the facts and continued :—]

If the defendant thought that he had a grievance which could be lawfully asserted the courts were open to him. I am not saying what the result of any application by him would have been, for though this is not the sort of agreement which any court could specifically enforce—for the court cannot specifically enforce an agreement for two people to live peaceably under the same roof—yet, of course, if the contract is broken, the defendant has got a common law remedy in damages, which, if he is right, might be heavy. The defendant, however, did not seek the intervention of the court, but took the law into his own hands and remedied the grievances under which he felt he was suffering in a manner which seems to me to have been wholly deplorable, all the more so when one considers that he is in charge of small boys at a preparatory school and ought to be inculcating into them a respect for authority and discipline. It appears to me that on his own showing he has been guilty at least of riot, affray, wilful damage, forcible entry and, perhaps, conspiracy.

Having got back into the house, to use the words of the statute, 5 Rich. II, c. 7, "with strong hand [and] with "multitude of people," he has established himself in the house, and he then says : "I ought not to have an injunction given "against me to make me go out because I got back here "and got my boys back and, therefore, I want the status quo

C. A.

1944

THOMPSON
v.
PARK.

Goddard L.J.

"preserved." The status quo that could be preserved was the status quo that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a court of law that we ought to help the defendant who has trespassed and got himself into these premises in the way in which he has done and to say that that would be preserving the status quo and a good reason for not granting an injunction. The strength of the argument which was put forward on the defendant's behalf was that, assuming that there had been a breach of contract on the part of the plaintiff, the defendant had a right to be where he was. That is an entire misconception of the legal position, which was that the defendant was a licensee on the premises. That licence has been withdrawn. Whether it has been rightly withdrawn or wrongly withdrawn matters nothing for this purpose. The licensee, once his licence is withdrawn, has no right to re-enter on the land. If he does, he is a common trespasser. The law is properly laid down in the following passage in Salmond on Torts, 9th ed., p. 258: "He who is ejected from land by "the licensor in breach of his licence, or is otherwise disturbed "by the licensor in the exercise of it, has even at common law, "and notwithstanding *Wood* v. *Leadbitter* (1), a good cause "of action in contract"—see *Kerrison* v. *Smith* (2)—"If, however, "the licensee insists, notwithstanding the revocation of his "licence (even though it is thus premature and wrongful) in "entering or remaining on the land or in otherwise exercising "his licence, he becomes at common law a trespasser or other "wrongdoer, and liable in an action accordingly at the suit "of the licensor. The rule is an illustration of the difference "between a legal *power* to do a thing effectively and a legal "*right* or *liberty* to do it lawfully. A licensor has at common "law the power to revoke the licence at any time, but he "has no right to revoke it before the expiration of the term." As this is an interlocutory proceeding it is convenient, instead of going through a large number of cases, simply to state the opinion of a leading text-book writer of great authority with which I entirely agree.

It may be said: Why did the learned judge refuse the injunction in so clear a case? I think that it must have been the interests of the boys at this school that impressed him, but in this class of case the court is not exercising the paternal jurisdiction of the Court of Chancery over infants. If we were

(1) (1845) 13 M. & W. 838. (2) [1897] 2 Q. B. 445.

the interests of the infants would be the paramount consideration, but we cannot allow the fact that the defendant has introduced a lot of small boys on to the plaintiff's property against his will to influence us when considering whether he should be restrained from continuing the trespass on the plaintiff's land. If we allowed that fact to influence our decision, it would mean that anybody who wanted to continue a trespass or assert the rights of a squatter would be well advised to provide himself with two or three children and then say: "The interests of these children have to be "considered. Therefore, do not turn us out." If the parents of these boys chose to send them back knowing the difficulties between the two headmasters, they did so at their own risk. They were warned by the plaintiff that he was not going to admit them again on to his property and he had a perfect right to say that. For these reasons, in my opinion, the plaintiff is clearly entitled to an injunction to restrain the defendant from trespassing on this land pending the trial of the action.

DU PARCQ L.J. I agree. When an application is made for an interim injunction, the court has a very difficult jurisdiction to exercise. It is sometimes impossible to make an order which may not do some injustice to one party or the other. It is impossible to go fully into the facts at that stage of the case, and, with the best will in the world, an order may be made which will afterwards be regretted. It appears to me, however, that in the present case no difficulty of that kind presents itself.

I do not know how this case is likely to be decided when it is heard. It may be found that the plaintiff has broken the agreement or that the defendant wrongfully repudiated the agreement, that the plaintiff must pay heavy damages to the defendant, or that the defendant must pay heavy damages to the plaintiff. But there is one thing of which we can be perfectly certain, and that is that the moment any court has to adjudicate on this matter and consider the facts it must say that when the defendant entered the plaintiff's premises on January 15 he had no right to do so, and that from that time he has remained there without having any right whatever to be there. When it is said that we should leave things as they are until such time as it is possible to hear the case, I ask: Why should we?

C. A.

1944
THOMPSON
v.
PARK.

du Parcq L.J.

The defendant knows as well as any of us that a little learning is a dangerous thing, and he had that small degree of learning about the law which led him into disaster, or, I may say, into misconduct. He says in his affidavit : " I had been advised " and am still advised that the actions of the plaintiff were " illegal, wrongful, and in breach of contract." What he did not understand was that it does not follow that, because one contracting party is breaking his contract, the other party is entitled to compel him, by force and by violence, to carry it out. I think that if the defendant had reflected for a few minutes he would have seen that, if the law permitted that, the rule of law in this country might very soon cease to exist. He did not understand the distinction which my Lord has now, I hope, made perfectly plain to him between a right to do a thing and a power to do a thing. There is not the slightest doubt that the plaintiff had the power to say : " You shall not come into my house," and thereafter, if the defendant did go in, he was a trespasser. It is as a trespasser and a wrongdoer that he has remained there, and we are both agreed that the sooner he gets out the better. I agree that this injunction ought to be granted.

Appeal allowed : order directing the defendant to remove himself and his boys from the premises within a week and his furniture within a month.

Solicitors for the plaintiff : *Simon, Haynes, Barlas & Ireland.*
Solicitors for defendant : *Kingsford, Dorman & Co.*

W. L. L. B.

C. A.

1944
March 8, 9, 16.

ASSOCIATED CINEMA PROPERTIES, LIMITED *v.* HAMPSTEAD BOROUGH COUNCIL.

Rates—Occupation—Empty dwelling-house—No physical possession—Intention to use as offices on the happening of uncertain event.

By an agreement in writing a company took for a term dwelling-houses so that they might have accommodation available for use as offices in the event of their premises being rendered unfit for use by enemy action or for use " owing to the exigencies of their " business." The company did not use the premises for any purpose, nor enter into physical possession of, nor place any furniture or other chattels on, the premises at any material time :—

C. A.

1944

Associated Cinema Properties, Ld. *v.* Hampstead Borough Council.

Held, that a mere intention to occupy premises on the happening of a future uncertain event cannot, without more, be regarded as evidence of occupation, and, therefore, that the company were not in rateable occupation of the premises as they had never been in actual occupation of them.

Rex v. *Melladew* [1907] 1 K. B. 192 and *Borwick* v. *Southwark Corporation* [1909] 1 K. B. 78, distinguished.

Decision of Divisional Court (ante, p. 49), affirmed.

Appeal from Divisional Court (1).

Hampstead Borough Council, as rating authority, made a complaint before Hampstead justices against Associated Cinema Properties, Ld., that they, being duly rated and assessed to general rates in respect of two dwelling-houses for which lawful demand had been made, had refused or neglected to pay them. At the hearing it was proved or admitted that the company had never used the dwelling-houses for any purpose; that the object of the company in becoming tenants of the dwelling-houses was to have accommodation available for offices in the event of their existing offices being rendered unfit for use by enemy action, or should they desire to use the dwelling-houses owing to the exigencies of their business; that by the written agreement of tenancy the company had undertaken to keep the premises in good and tenantable repair, order and condition, provided that they should not be under any liability for the maintenance, repair or preservation of the premises unless and until they should enter into possession of the same, and in the meantime the landlords were to be at liberty to take such action as they should consider necessary for such maintenance, repair or preservation; that the company had not entered into physical possession of the premises and the landlords had taken the steps necessary for the maintenance, repair and preservation thereof; that the company, by the tenancy agreement, agreed not to use the premises or any part thereof otherwise than for private dwelling-houses or for emergency offices in connexion with the business of the company; that no steps had been taken to adapt the dwelling-houses for use for emergency offices, but they were at all material times capable of being so used without any structural alterations; that at no material time had there been any furniture or other chattels on the premises; and that the rates had been duly made and demanded from the company, but not paid. The justices

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(1) Ante, p. 49.

C. A.
1944
ASSOCIATED CINEMA PROPERTIES, LD. *v.* HAMPSTEAD BOROUGH COUNCIL.

were of opinion that the company were at all material times in occupation of the premises and that a distress warrant could lawfully issue. The questions raised by a case stated for the opinion of the Divisional Court were (1.) whether the justices were bound to hold, as they did, that the company were occupiers of the dwelling-houses; and (2.) if they were not so bound, whether their decision could be justified on the facts found. The Divisional Court answered both questions in the negative, and the borough council appealed.

Sydney Turner K.C. and *Simes* for the council.
Comyns Carr K.C. and *Squibb* for the company.

The arguments were substantially the same as those addressed to the Divisional Court (ante, pp. 50–53).

Cur. adv. vult.

March 16. DU PARCQ L.J. read the judgment of the court (SCOTT, GODDARD and DU PARCQ L.JJ.). The Divisional Court thought that both the questions asked in the case stated should be answered in the negative; and we agree with them. It is well settled that, to constitute occupation under the statute of Elizabeth (43 Eliz. c. 2.), there must be use and enjoyment of the hereditament. Thus, in *Borwick* v. *Southwark Corporation* (1), Bigham J. defined occupation, for the purpose of rateability, as being "constituted of legal "possession and of permanent (as distinguished from mere "temporary) user." (2) When the hereditament is a house, it is not rateable unless it is occupied as a house, unless, that is to say, it is used for one of the purposes for which a house may be used. In *Westminster City Council* v. *Southern Ry. Co.* (3), Lord Russell of Killowen stated the rule, without qualification, in these words (4): "The owner of an empty "house has the legal possession, but he is not in rateable "occupation." In the instructive passage from the speech of Lord Atkinson in *Liverpool Corporation* v. *Chorley Union Assessment Committee* (5) (which was quoted by Charles J. in the Divisional Court) that learned lord elaborated an explanation of the rule which had been given earlier by Lord

(1) [1909] 1 K. B. 78.
(2) Ibid. 83.
(3) [1936] A. C. 511.
(4) Ibid. 529.
(5) [1913] A. C. 197.

Halsbury (1). It may be observed that every owner who has the legal possession of an empty house, may, if he pleases, occupy it or otherwise use it at any time, and it may ordinarily be assumed that he would occupy it if ever it suited his purpose to do so. If it were legitimate to regard him as an occupier for that reason, the rule stated by Lord Russell, which has long been firmly established, would cease to have any meaning or effect.

It was contended, however, on behalf of the council that "the possibility of physical occupation coupled with the "intention to occupy physically in case of need" constituted rateable occupation. In support of this submission much reliance was placed on the two cases which the justices had regarded as compelling them to hold that the company were occupiers. Of these the first was *Rex* v. *Melladew* (2). The hereditament there in question was a warehouse Now, it is the business of a warehouseman to let unoccupied space for the purpose of the temporary storage of goods. To be available for this purpose, the warehouse must be empty, in whole or in part. If the owner makes a public announcement that he is prepared to let space in an empty warehouse, he may reasonably be said to be using that warehouse for the purposes of his business. This, briefly, was the ratio decidendi of *Rex* v. *Melladew* (2); and it has, in our judgment, no relevance to the present case. *Borwick* v. *Southwark Corporation* (3), which was the other case relied on by the justices, may appear at first sight to give more support to the council's contention. The correctness of this decision has been doubted, and, if it were necessary to read it as affirming the proposition that a mere intention to occupy empty premises in a problematical contingency is equivalent to occupation, we should regard it as contrary to established principle and unsound. It is, however, clearly distinguishable on the facts from the present case. In *Borwick* v. *Southwark Corporation* (3), the owners of the hereditament were manufacturers who had bought it with the object of having premises to which they might transfer their business in the event of some emergency arising, such as the destruction of their existing factory by fire, or, as it was shortly put, as "stand-by" premises. It was argued that the mere proof of this motive was enough to make the premises rateable. There was proof, however, of the additional fact that the manufacturers had installed on the premises shafting and wooden benches suitable for their business. It was on this fact that Lord Alverstone C.J. based his judgment. " I think," he said (1), " they are making use of it by having the necessary " shafting and benches upon the premises in readiness for use." The learned Lord Chief Justice deliberately refrained from expressing any opinion on the question (which did not then arise for decision) whether in these circumstances the building would be rateable as a warehouse only and not as a factory. Bigham J., who treated the case as purely one of fact, also attached much importance to the erection and maintenance of the shafting and the provision of benches. Walton J., alone, seems to have accepted the view for which the council now contends.

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(1) [1913] A.C. 211.

(2) [1907] 1 K. B. 192.

(3) [1909] 1 K. B. 78.

It is significant that no case could be cited in which occupation had been held to be established without proof of some overt act amounting to evidence of user. In *Rex* v. *Melladew* (2) the owner had advertised the premises as a warehouse. In most cases user has been proved by showing that the house has been furnished, or equipped for some business purpose. There is certainly no authority binding on this court for the proposition advanced on behalf of the council, and, in our judgment, a mere intention to occupy premises on the happening of a future uncertain event, cannot, without more, be regarded as evidence of occupation. It is true that it was said by Sir Richard Henn Collins M.R., in *Rex* v. *Melladew* (3), " that the intention of the alleged occupier " in respect to the hereditament is a governing factor in " determining the question whether rateable occupancy has " been established," and that many other authorities show that it is often important to ascertain the owner's intention. When these authorities are examined, however, it becomes manifest that intention is relevant only when it goes to show present occupation and user. The instances given by the Master of the Rolls in the passage just cited make this plain. A person is found living in a house by virtue of an agreement with its owner. Is he an occupier or a mere lodger? To decide this question, it is necessary to look at the agreement in order to ascertain the intention of the parties. A man has left furniture in a house, though he is not residing there. That fact shows an intention to return or to enter and so proves that he is enjoying the use of a furnished house. The tenant

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(1) [1909] 1 K B. 83.

(2) [1907] 1 K. B. 192.

(3) [1907] 1 K. B. 201.

C. A.
1944
Associated Cinema Properties, Ld.
v.
Hampstead Borough Council.

of a seaside boarding-house has shut it up for the winter. The fact that he intends to re-open it in the summer is proof that he is now using and occupying it as a boarding-house although the seasonal nature of the trade causes it to be temporarily closed. It is never true to say that a mere intention to occupy in hypothetical circumstances which may never come into existence is equivalent to occupation.

For these reasons we agree with the decision of the Divisional Court that the facts found do not establish rateable occupation. The appeal must be dismissed, with costs.

Appeal dismissed.

Solicitor for borough council : *P. H. Harrold, Hampstead.*
Solicitors for company : *Waterhouse & Co.*

C. G. M.

REX *v.* JACOBS AND OTHERS.

C. C. A.
1944
Feb. 29 ;
Mar. 13.

Criminal law—Conspiracy—Agreement to sell price-controlled goods at excess price—Ignorance of proper price.

The appellants were approached by M., who posed as a manufacturer's agent, and from him they bought a quantity of razor-blades at a price in excess of the permitted price. The appellants were charged with conspiracy to contravene s. 1 of the Prices of Goods Act, 1939. No evidence was called by the prosecution that they knew that the price paid by them was in excess of the permitted price. In summing-up, the judge directed the jury that it was not necessary that the prosecution should prove that the appellants knew what the permitted price was, but that they need only show that in fact a sale at an excessive price had taken place, and that all the appellants were all engaged in the sale:—

Held, that this direction was correct in law.

Appeals against conviction.

The appellants, Philip Jacobs, Henry Simon Carr and William Longton Fairhurst, were convicted at Liverpool Assizes of conspiracy. Jacobs and Carr were directors of Carris, Ld., chemists, and Fairhurst was employed as the company's buyer. In May, 1943, Fairhurst was approached by one Mulholland, who posed as a manufacturer's agent, and from him the appellants bought 300 gross razor blades at

C. C. A.
1944
Rex
v.
Jacobs.

42*s.* per gross, the controlled price being 15*s.* per gross. Mulholland and the three appellants were charged in count 1 of the indictment with conspiracy to contravene s. 1 of the Prices of Goods Act, 1939,which provides " It shall be unlawful " for any person to sell, agree to sell or offer to sell, any price-" regulated goods . . . . at a price which exceeds the " permitted price." At the close of the case for the prosecution it was submitted that the appellants could not be convicted unless it was proved that they knew that the price they paid was above the permitted price. Wrottesley J., in summing up to the jury, said : " I must remind you that the prosecution " . . . . do not set out to prove that these men knew what " the price was . . . . All that they set out to prove is that " a sale at . . . . a wrong price took place and that these " four men were all in it, were all engaged in it and knew of " it . . . It is not necessary that you should find . . . . " that they knew exactly what the right price was or that the " price in question was the wrong one. It is not necessary " that every member of the conspiracy should know that. " The offence is to sell at the wrong price, and in so far as " they all agreed to do that or any of them agreed to do that, " they are guilty." Mulholland had pleaded Guilty to the offence created by s. 1. The jury convicted all the appellants who now appealed.

Flowers K.C. and *Baucher* for Jacobs and Carr. There was no evidence that the appellants knew that the price they were paying was in excess of the permitted price, and it is not suggested that they did. They were, therefore, innocent buyers, and the Act recognizes two classes of buyers, innocent and guilty. By s. 10, sub-ss. 1 and 2, the buyer in a case like the present is given certain civil rights and remedies with regard to the goods purchased unless (sub-s. 5) he is liable to punishment as an aider and abettor. The appellants have been acquitted as aiders and abettors, that is guilty buyers, and the sub-section does not include among those excluded from civil remedies those who have innocently violated the statute. If the argument for the Crown is right anyone purchasing one of these blades is guilty of conspiracy. No doubt Mulholland was liable whether he knew about the prices or not, but this cannot affect the appellants.

Laski K.C. and *Baucher* for Fairhurst.

Jolly K.C. and *R. H. Blundell* for the Crown. The whole object of s. 10 of the Act was to enable a buyer who has been forced to buy at an excess price through the crime of the seller to recover the excess, and does not touch on liability for conspiracy to do an unlawful act, namely, to buy price-controlled goods at an excessive price, which, undoubtedly, the appellants did. It is, admittedly, not necessary to prove mens rea on the substantive charge under s. 1 of the Act, and, therefore, it is not necessary to prove it on a charge of conspiracy to commit the substantive offence. The defence here really is ignorance of law, but as dealers in these goods, it was the duty of the appellants to make themselves acquainted with the law as to prices.

Cur. adv. vult.

March 13. The judgment of the court (HUMPHREYS, STABLE and CASSELS JJ.) was delivered by

HUMPHREYS J., who stated the facts and continued : It has not been disputed that the transaction involved Mulholland in a breach of s. 1 of the Prices of Goods Act, 1939. The indictment contained eight counts, of which only two are material here. Count 6 charged Mulholland with the offence created by s. 1 of the Act of 1939, to which he pleaded guilty, and the three appellants with aiding and abetting in that unlawful sale. Count 1 charged all four persons with a conspiracy to contravene the provisions of the Prices of Goods Act, 1939, by selling price-regulated goods in the course of a business at a price in excess of the permitted price. At the close of the case for the prosecution, a submission was made that the accused could not be convicted on count 1 or 6 unless it was proved that they knew that the price they were paying was above the permitted price. As to count 6, the appellants relied almost entirely on the language of sub-s. 5 of s. 10 of the Act of 1939. The side-note of that section reads as follows : " Right of buyer to avoid prohibited transaction, or " to recover excess price," and the section is solely concerned with the civil rights of parties who have been parties to a transaction which is an offence against s. 1 of the Act. It was submitted that the sub-section must be read as indicating that there are two classes of buyers—those who buy without aiding and abetting and those who buy by aiding and abetting, the latter being those who knew, and the former those who did not know, the controlled price of goods, the buyers in the former category only being awarded the rights conferred by the section. Wrottesley J. accepted that contention as to count 6 and withdrew that count from the jury. As to count 1, the learned judge declined to stop the case.

The jury having convicted all the accused on count 1, we have been invited to hold that the direction given to the jury by Wrottesley J. was wrong. Reliance was again placed on s. 10 and also on s. 15. Section 15 appears to be directed to the rights of third parties and does not really carry the matter any further. Counsel for the appellants also relied strongly on the ruling of the learned judge as to the law of aiding and abetting. As to the correctness of that ruling this court is not called on to express an opinion. We desire, however, to guard ourselves against being supposed to assent to the proposition that a person who aids and abets another in the commission of an offence not involving any mens rea in the principal cannot be convicted in the absence of proof of mens rea on his own part. In our judgment, however, any difficulty which may be created by the language of s. 10 can have no relevance to the consideration of the offence charged in count 1 of this indictment. That count does not charge any offence against this or any other statute, nor does it even involve the proposition that any such offence has been committed. It charges a common law misdemeanor, the accepted definition of which for centuries before 1832 was " an agreement between " two or more persons to do an unlawful act," sometimes expressed as " an agreement for accomplishing an unlawful " end." The antithesis introduced by Lord Denman in *Rex* v. *Jones* (1), decided in that year, " or a lawful act by " unlawful means," was not intended to alter the definition of criminal conspiracy and in any event does not assist the present appellants. The unlawful act alleged to be the subject of the agreement in this case is the selling of price-regulated goods at a price in excess of the permitted price. It is beyond question that the appellants did agree with Mulholland that they should buy and he should sell razor blades at 42*s.* a gross. What then is the answer? It appears to be that they did not know the terms of the orders regulating the prices of the goods in which they dealt, but ignorantia juris neminem excusat. Mr. Flowers, for Jacobs and Carr, insisted that his clients were innocent buyers. It would, we think, be more

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(1) (1832) 4 B. & Ad. 345, 349.

C. C. A.

1944

REX
v.
JACOBS.

accurate to describe them as buyers ignorant of the matters which it was their bounden duty to know and about which the slightest inquiry would have resulted in their enlightenment. In our judgment, the common law was correctly interpreted by the learned judge in his direction to the jury. Mr. Laski, for Fairhurst, felt himself unable to argue to the contrary, but submitted that the language of this statute indicated an intention to override the common law. It is, no doubt, true that Parliament can do anything, but the court finds nothing in this statute indicating any such revolutionary tendency. The conviction on count 1 is upheld, and the appeals are dismissed.

Appeals dismissed.

Solicitor for Jacobs and Carr: *S. B. Levin, Liverpool.*

Solicitors for Fairhurst: *Ernest B. Kendall & Rigby, Liverpool.*

Solicitor for Crown: *Director of Public Prosecutions.*

W. L. L. B.

EASSON *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

C. A.

1944

March 2, 3.

Negligence — Evidence — Res ipsa loquitur — Fall by passenger from corridor train through door—Opening of door unexplained.

A child, aged four years, fell through a door in the corridor of a train belonging to the defendant railway company while the train was in motion, and was injured. There being no evidence how the door was opened :—

Held, that the mere fact that the door was opened was not of itself prima facie evidence of negligence against the railway company.

APPEAL from Croom-Johnson J.

The infant plaintiff, a boy aged four years, while travelling with his mother on an express corridor train from Newcastle to London, after the train left Grantham station was allowed by his mother to go to the lavatory alone. About seven miles south of Grantham he fell from a vestibule in the corridor of a coach through a door on the off-side of the train on to the railway line and was injured. Later, the door was found open by a passenger, but there was no evidence how it became open. In an action by the infant plaintiff and his father against the railway company for damages alleging negligence on the part of the railway company, Croom-Johnson J. said that he applied the rule laid down in *Gee* v. *Metropolitan Ry Co.* (1) and *Richards* v. *Great Eastern Ry. Co.* (2) that, if a door of a railway coach fell open and a passenger was injured, a jury could find from that circumstance alone that there was evidence of negligence on the part of the railway company, but that he was satisfied by the evidence that there was no negligence by the company for whom he gave judgment. The plaintiffs appealed.

Vick K.C. and *Platts Mills* for the plaintiffs. The injured child must have fallen through an open door of the carriage since he was too small to have opened the door from the outside himself and the door could not have been opened from the inside. The case, therefore, is one of res ipsa loquitur and the onus is on the defendants to establish absence of negligence: *Gee* v. *Metropolitan Ry. Co.* (1), which was followed in *Richards* v. *Great Eastern Ry Co.* (2), *Burns* v. *North British Ry Co.* (3) and *Inglis* v. *London, Midland and Scottish Ry Co.* (4).

Lynskey K.C. and *Gerald Howard* for the defendants were not called on.

GODDARD L.J. Counsel for the plaintiffs has contended that, once it is established that the accident happened through the boy falling through the open door on the off-side of this corridor train, the burden of proof is on the railway company to explain how that door came to be open. That contention is based on the doctrine of res ipsa loquitur, which applies when the operation of "the thing" which caused the accident is at the material time wholly under the control of the defendant. The classic case is *Scott* v. *London and St. Katherine Docks Co.* (5) where bags of sugar fell from a warehouse occupied by the defendants on a passer by. The defendants were called on to explain how it came about that the bags so fell because "the thing" which caused the accident was entirely under their control. Likewise, when a collision happens on the railway, since the railway system and the trains thereon are entirely under the control of the railway company,

(1) (1873) L. R. 8 Q. B. 161.
(2) (1873) 28 L. T. 711.
(3) 1914 S. C. 754.
(4) 1941 S. C. 551.
(5) (1865) 3 H. & C. 596.

C. A.

1944

EASSON
v.
LONDON AND
NORTH
EASTERN
RAILWAY
CO.

Goddard L.J.

it is for the company to explain, if they can, how the accident happened and to show that it occurred without fault on their part. The same doctrine exists in the law of bailment. Property is held by a bailee who is only liable for loss if the loss is occasioned by his negligence, but in an action by the bailor for the return of the goods when the bailee pleads that they have been lost, it is for the bailee to show that the loss occurred without negligence on his part. The burden is not thrown in the first instance on the bailor to prove that there was negligence by the bailee because in most, or, at any rate, many cases, that would be an impossible task, for the property has throughout been in the care and under the control of the bailee.

Can that doctrine apply in a case where the door of a railway carriage comes open? In some cases the plaintiff may be able to show a state of facts which prima facie, at any rate, establishes a case of negligence. Such was *Gee* v. *Metropolitan Ry Co.* (1). None of the reported cases, however, really laid down any principle of law. They only show that in the circumstances of the case there was evidence on which the jury could find a verdict for the plaintiff. In *Gee* v. *Metropolitan Ry Co.* (1) a train on the Metropolitan Railway started from Westminster station. At Victoria station, which is two stations west of Westminster, the plaintiff got into an empty compartment. Before the train had reached Sloane Square, the next station, the plaintiff leant lightly against the off-side door of the carriage. The door flew open and he fell on to the line. It is the duty of a railway company to have their train in a proper and fit condition with the doors properly fastened when it starts on its journey, and the obvious inference was that the railway company had not performed their duty and seen that the train was in a safe condition when it left Westminster station on its journey. In *Burns* v. *North British Ry Co.* (2) a woman was walking along a platform at a station in Glasgow when she was struck from behind by the open door of a carriage of a train which was running into the station. That train had been stopping at various stations, and the inference was that at the last stopping place the door had not been properly closed, so that there was a prima facie case of negligence. The accident in *Inglis* v. *London, Midland and Scottish Ry Co.* (3) was not unlike that in the present case,

(1) L. R. 8 Q. B. 161.

(2) 1914 S. C. 754.

(3) 1941 S. C. 551.

except that the fall of the boy, who was aged eight, was through the door of a compartment of a carriage on the train. At the trial before the sheriff-substitute evidence was given by all the people in the carriage to negative the fact that they had in any way interfered with the lock of the carriage-door. Their evidence being accepted, the inference was that the door had not been properly closed by the railway company's servants when the train left the station, and, therefore, there was a case for the railway company to answer. Lord Moncrieff, to whose judgment I especially refer, said (1): " When the " door which opens has in fact remained under the sole control " of the company or its servants up to the moment of opening " —which was the case in *Gee* v. *Metropolitan Ry Co.* (2)— " the single fact of its unexplained opening may thus *per se* " be relevant to infer negligence against them: and so to " operate in a manner analogous to cases of res ipsa loquitur " by itself transferring the onus of proof. Even in such a case, " however, there will be at most an analogy with, and not a " proper example of, an application of the maxim. In the " present case, on the other hand, there is found to have been " no continuity of any single control of the door. Control " by the defenders must be taken to have ended at latest on the " conclusion of the last inspection at St. Enoch's."

In the present case it seems to me it is impossible to say that the doors of an express corridor train travelling from Edinburgh to London are continuously under the sole control of the railway company in the sense in which it is necessary that they should be for the doctrine of res ipsa loquitur, or a doctrine analogous to it, to apply. Passengers are walking up and down the corridors during the journey and get in and out at stopping places. I do not want it to be thought that I am minimizing the duty of the company. Before a train leaves a station the company must see that the carriage doors are closed. They are not under an obligation to inspect the off-side doors of the carriages at every stop. There must be reasonable inspection, and they must do the best they can.

In my opinion, the learned judge was justified in drawing the inference—I do not see what other inference could be drawn—that some-one, either out of a spirit of mischief or for some other reason, must have turned the handle of the door and left it open, and if the little boy was in the lavatory immediately adjoining this door he might

(1) 1941 S. C. 561. (2) L. R. 8 Q. B. 161.

easily have come out and fallen on the line. I am certainly not prepared to hold, nor do I think any of the authorities which have been cited establish, that the mere fact that on a journey of this sort a door comes open is in itself evidence of negligence against the company so as to put on them the burden of explaining how it came open. There was, therefore, no evidence of negligence against the company. On the other hand, the evidence seems to me to show that there was reasonable inspection and that the door was fitted with a lock of the most modern and approved type which was in perfect working order. Therefore, the door was in a condition which, unless some evilly or officiously disposed person interfered with it, was perfectly safe. The cause of the accident was the opening of the door which must have taken place by some human agency inside the train. The decision of the learned judge was right and this appeal must be dismissed.

du Parcq L.J.: I agree. This seems to me to be a very important case and for that reason I will add some words of my own. Where an action is based on negligence, the plaintiff has to prove negligence on the part of the defendant, and that by reason of that negligence he has suffered damage. Much has been said about what is called the doctrine of res ipsa loquitur. That there is such a doctrine nobody doubts, but, if it is invoked, it is necessary to be sure what the precise doctrine is. The words res ipsa loquitur themselves are hardly a proposition of law though they allude to one. They are a figure of speech, by which sometimes is meant that certain facts are so inconsistent with any view except that the defendant has been negligent that any jury which, on proof of those facts, found that negligence was not proved would be giving a perverse verdict. Sometimes, the proposition does not go as far as that, but is merely that on proof of certain facts an inference of negligence may be drawn by a reasonable jury although the precise circumstances are not fully known. In *Cole* v. *De Trafford* (*No.* 2) (1) Pickford L.J. thus stated his view of the meaning of the expression res ipsa loquitur (2): "I take that well-known expression to mean that an accident "may by its nature be more consistent with its being caused "by negligence for which the defendant is responsible than "by other causes, and that in such a case the mere fact of the "accident is prima facie evidence of such negligence." As

(1) [1918] 2 Q. B. 523.

(2) Ibid. 528.

my Lord has pointed out, one must be careful to remember, when one looks at decisions like *Gee* v. *The Metropolitan Ry Co.* (1), that the question before the court was, not whether negligence was to be regarded as proved as a matter of law, but whether the jury was entitled to find negligence proved. There is danger, particularly in these days when few cases are tried with juries, of exalting to the status of propositions of law what really are particular applications to special facts of propositions of ordinary good sense. It is a grave error to suppose that guidance is necessarily to be found in a case where a passenger has fallen through a carriage door-way by referring to all the other cases in the books in which passengers have fallen through carriage door-ways. It is a truism to every lawyer that what one must look for is a general principle. In the present case we get assistance, no doubt, by looking at cases about accidents on railways as we do by considering cases of accidents of other kinds, but one must be careful to see what the precise facts of each case are. It is true, as was said in *Gee* v. *Metropolitan Ry Co.* (2), that there is a duty on a railway company to see that the doors of a train are properly secured. That is, perhaps, not accurately described as a proposition of law. It is the application to the facts of the case of the general principle that a railway company must see that their carriages are in as safe a condition so far as reasonable care and skill can provide, and it follows from that, as any juryman would be likely to say, that, when a train has arrived at a station and the doors have been opened to permit people to get in and out, the company's servants must see that the doors are securely shut. One hardly needs authority for that proposition. What we find in *Gee* v. *Metropolitan Ry. Co.* (1) and the Scottish cases which have been referred to is the application to special facts of the general principle which was laid down in *Scott* v. *London and St. Katherine Docks Co.* (3) that, where a thing which causes an accident is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management of that thing use proper care, it is a reasonable inference, in the absence of explanation by the defendant, that the accident arose from his want of care. I will assume, though I am not saying that it is proved, that this train proceeded for some distance beyond

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(1) L. R. 8 Q. B. 161.
(2) Ibid. 165.
(3) (1865) 3 H. & C. 596.

C. A.
1944
EASSON v. LONDON AND NORTH EASTERN RAILWAY CO.
du Parcq L.J.

Grantham with the door imperfectly fastened in the sense that it was on the safety catch. The evidence established to the satisfaction of the learned judge, and I see no reason to doubt that he was right, that, even if the lock were on the safety catch, there was no danger to anybody if nobody interfered with it. There is nothing to suggest that any servant of the railway company interfered with the door so as to make it more dangerous, and so one is forced to the conclusion that any negligence there may have been on the part of the company did not cause the accident, but that this little boy would have been safe but for the interference of some other person. On the other hand, if the door was never on the safety catch but was perfectly fastened when the train left Grantham, clearly there was no negligence on the part of the company. I can see no ground for thinking that the learned judge came to a wrong conclusion. I agree, therefore, that the appeal must be dismissed.

VAISEY J.: I agree. I am in no way satisfied that the railway company, having regard to the known facts and to the inferences proper to be drawn from them, can be made liable in damages for the injury which this child has suffered.

Appeal dismissed.

Solicitors for plaintiffs: *Gregory, Rowcliffe & Co., for Williams & Co., Peterborough.*
Solicitor for company: *W. H. Hanscombe.*

C. G. M.

In re A SOLICITOR.

1944
March 13.

Solicitor—Striking name off roll—Refusal of Disciplinary Committee to suspend filing of order pending appeal—Jurisdiction of court to stay publication of order—Solicitors (Disciplinary Proceedings) Rules, 1942, *St. R. & O.*, 1942, *No.* 1831/L. 25, *r.* 29.

Where an application is made by a solicitor, whose name has been ordered by the Disciplinary Committee of the Law Society to be struck off the roll of solicitors, to suspend the filing of the order with the registrar of the Law Society, and that application is refused by the committee, the court has no jurisdiction to suspend the publication of the proceedings.

In re a Solicitor [1924] 1 K. B. 699 not followed.

APPLICATION on behalf of a solicitor against whom an order had been made on March 10, 1944, by the Disciplinary

Committee of the Law Society that his name should be struck off the Roll of Solicitors of the Supreme Court. As soon as the committee had pronounced its findings and order in public, the solicitor applied to the committee under r. 29 of the Solicitors (Disciplinary Proceedings) Rules, 1942 (1), to suspend the filing of the order with the registrar pending the hearing of an appeal by him, but that application was refused by the committee. Notice of the application to the Divisional Court was served upon the Council of the Law Society as Registrar of Solicitors.

Lindner for the applicant. An appeal is being brought against the decision of the Disciplinary Committee, and it is sought by this application to prevent the irreparable damage that would be done to the applicant by the publication in the *London Gazette* of a notice stating that his name had been struck off the roll of solicitors, a decision which may be reversed on appeal. In *In re a Solicitor* (2) the Divisional Court suspended the operation of an order of the Disciplinary Committee.

Monier-Williams for the Registrar of Solicitors. The court has no jurisdiction to make the order asked for. The requirements of the statute are mandatory, and an obligation is placed on the registrar to act forthwith on the filing of the order of the Disciplinary Committee. Rule 29 of the Solicitors (Disciplinary Proceedings) Rules, 1942, provides a party, against whom an order has been made by the Disciplinary Committee, with an opportunity of making an application immediately to the committee to suspend the filing of the order with the registrar pending the hearing of an appeal. The applicant in the present made such an application, but the committee refused to grant it, and there is no provision in the Solicitors' Acts or in the rules made thereunder for an appeal from a refusal by the Disciplinary Committee to suspend the filing with the registrar of their findings and order. In *In re*

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(1) Solicitors (Disciplinary Proceedings) Rules, 1942, r. 29 (1.): "The committee shall have power, "upon the application of a party "against or with respect to whom "they have made an order, to "suspend the filing thereof with "the registrar . . . ."

(2.) "Where the filing of an "order is suspended under this "rule the order shall not take "effect until it is filed with the "registrar . . . ."

(2) [1924] 1 K. B. 699.

a Solicitor (1) where a stay of publication of the order of the Disciplinary Committee was granted by the Divisional Court pending the hearing of an appeal, the order the publication of which was suspended was merely for the suspension of the solicitor from practice for a period of two years. The point that the court had no jurisdiction to entertain the application was raised, and Avory J., in delivering the judgment of the court, said that they were creating a precedent which might or might not be followed in the future when further argument had been heard. This court, therefore, is not bound to follow that decision. The findings and order of the Disciplinary Committee were pronounced in public, and reports thereof have already appeared in the public press, and, therefore, the damage which this application seeks to avoid has already taken place to some extent.

Lindner in reply. The court has an inherent jurisdiction to make an order restraining the registrar from publishing the decision of the Disciplinary Committee until after the hearing of an appeal, and the fact that the registrar is under a statutory duty to do certain things following on the filing of the decision does not interfere with that inherent jurisdiction.

VISCOUNT CALDECOTE C.J. This application comes before this court in a somewhat unusual form. It is, in point of procedure, an ex parte application that the court should prevent further steps being taken as the result of certain findings of the Disciplinary Committee of the Law Society, the tribunal having ordered the name of the applicant to be struck off the roll of solicitors. The applicant has given notice to the Registrar of Solicitors of his intention to make an application to this court to stay the further publication of the findings and order of the committee, and what would otherwise have been an ex parte application has now become a motion made to the court with the advantage of counsel being present to represent the Registrar of Solicitors.

The question which has been raised is whether this court has any jurisdiction to make an order to stay further proceedings as the result of the findings of the Disciplinary Committee of the Law Society. The procedure which has to be followed in a case of a decision of the committee adverse to the solicitor is set out in Cordery on Solicitors, 4th ed.,

(1) [1924] 1 K. B. 699.

p. 227. The decision of the committee, with a statement of their findings of fact, is to be pronounced in public, and after pronouncement a copy of the findings and order is sent to the applicant within four days, and to the Registrar of Solicitors within eight days. In due course notice of the order has to be published in the *London Gazette,* and it is plain that when that point is reached the adverse effect on the solicitor in question will be serious. In the present case we have no papers and no affidavit, and, therefore, I am not in a position to say when the findings were made, or when steps consequent on the findings have to be taken. We have, however, been informed by counsel that certain publicity has now been given to the findings of the committee, the order made by the committee being that the applicant's name should be struck off the roll of solicitors, but, it is said, it is desired to prevent further injury that may arise to him by reason of the publication of the order in the *London Gazette.* It is said by counsel for the applicant that there is inherent jurisdiction in the court to prevent the injury which the applicant will suffer if the further publication of the proceedings is not stayed until after his appeal has been heard and determined. So far as I am aware no appeal has as yet been entered, but it is said that it is the applicant's intention to enter an appeal.

A question of the same nature was considered by this court in *In re a Solicitor* (1) where Avory J. prefaced the judgment of the court with a statement which might equally well be made in this present case. He said (2) : " It is to be regretted " that, owing to the fact that notice of this application was " only served this morning, the Law Society has not had an " opportunity of fully considering the question of jurisdiction " raised before us ; but it is impossible for the court to do " justice in this matter without creating a precedent, which " may or may not be followed in the future when further " argument may be heard upon it." Having regard to that language, this court is free to arrive at any decision which it thinks right in the matter without treating that decision as a binding authority. The learned judge went on to say : " Assuming, as I think we are entitled to assume, that there " is some ground for the appeal by the solicitor, the court " must have inherent jurisdiction to make such an order as " will avert the possible mischief that must arise if the " registrar proceeds, as provided by s. 7, sub-s. 1, of the

(1) [1924] 1 K. B. 699. (2) Ibid. 690.

" Solicitors Act, 1919, to cause the order of the committee to " be published in the *London Gazette* forthwith."

If these were proceedings in connexion with which no rules had been made, or if the rules were not in the form in which they are, it is possible that the court would consider that it had jurisdiction to make an order to prevent a solicitor suffering injury which, in the event of a successful appeal, it would be clear that he ought not to have suffered. By r. 29 (1.) of the Solicitors (Disciplinary Proceedings) Rules, 1942, it is provided: " The committee shall have power, " upon the application of a party against or with respect to " whom they have made an order, to suspend the filing thereof " with the registrar." In *In re a Solicitor* (1) the court said that the application should be made in the first instance to the committee of the Law Society. In the present case an application was made to the committee, and added to the application was an offer of an undertaking not to practise until the appeal had been heard and determined, but the committee thought right to refuse the application. The question, therefore, is whether or not this court has inherent jurisdiction—for none is provided by the rules or by any section of the Solicitors Act, 1932—to make an order suspending the publication of these proceedings, notwithstanding the fact that the committee have declined to exercise the power which they have under r. 29 to prevent further steps being taken until an appeal had been heard. I find it impossible to say that the court has inherent jurisdiction to suspend the publication of the proceedings when the rules give jurisdiction to the committee to make such an order, but are silent as to any power of the court. Therefore, I think this application should be refused. I only desire to add that we know nothing about the times at which certain things have been done, or how much more time there is for the desired steps to be taken. That seems to me to show that the court has no inherent jurisdiction because it would be futile for the court to attempt to stop proceedings or steps which may have already taken place.

HUMPHREYS J. I am of the same opinion. This application comes before the court in that most attractive form, an appeal to the inherent jurisdiction of the court. The judges of this Division have always been friendly to an application

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(1) [1924] 1 K. B. 699.

1944

A SOLICITOR, *In re.*

Humphreys J.

based on that ground, but one has to remember that, however desirable it may be, in order to prevent injustice, not to confine within too strict limits what is known as the inherent jurisdiction of the court, it is quite another thing for this court to be invited to override the terms of statutes and statutory rules which have the effect of statutes, and to say, as we are invited by this application in effect to say that, while those statutes and rules provide no stay of proceedings on an appeal to this court, this court will allow the necessary stay under its inherent jurisdiction. It is principally on that ground that I base my judgment. It may well be that even that tentative judgment of Avory J. in *In re a Solicitor* (1), which he himself observed might or might not be followed in the future when further argument had been heard on the point, might have been different if the learned judge had been told, as we have been told, that application had been made to the proper tribunal prescribed by the rule for staying publication of the proceedings. I entirely agree with the judgment of the Lord Chief Justice and with the reasons which have prompted that judgment.

MACNAGHTEN J. I agree that this motion should be dismissed.

Application refused.

Solicitor for applicant : *J. Jubb.*
Solicitor for Law Society : *T. G. Lund.*

(1) [1924] 1 K. B. 699.

R. F. S.

C. A.

1944

Feb. 16, 17.

GEORGE MONRO, LIMITED *v.* AMERICAN CYANAMID AND CHEMICAL CORPORATION.

Practice—Writ—Service out of jurisdiction—Contract not made within jurisdiction—Performance of contract outside the jurisdiction—Damage within jurisdiction—" Tort committed within the jurisdiction "—R. S. C., Or. xi, r. 1 (*e*), (*ee*).

The plaintiffs made a contract with an American corporation under which they bought goods from the corporation. The contract provided for the passing of the property in the goods in the State of New York, and for the construction of the contract and the determination of the rights of the parties under it

C. A.

1944

GEORGE MONRO, LD. *v.* AMERICAN CYANAMID AND CHEMICAL CORP.

according to the law of the State of New York. The goods were dangerous unless certain precautions were taken, and the plaintiffs became liable to pay a proportion of the damage sustained by a person from the use of the goods. The plaintiffs began an action against the American corporation to recover those damages, the writ being endorsed for damages for negligence and " breach " of contract," and applied for and obtained leave to serve notice of the writ out of the jurisdiction. The affidavit filed in support of the application did not set out the terms of the contract or allege that it was made within the jurisdiction of the courts of this country, nor did it disclose facts showing that the tort relied on by the plaintiffs was committed within the jurisdiction. On an application by the corporation to set aside the service :—

Held, that, as the affidavit filed in support of the application for service of the writ out of the jurisdiction did not disclose facts showing that the contract, for the alleged breach of which the action was brought, was made within the jurisdiction, nor that the tort alleged as a cause of action was committed within the jurisdiction, the service of the writ out of the jurisdiction was not permitted by R. S. C., Or. XI, r. I (*e*) and (*ee*), and must, therefore, be set aside.

Per Scott L.J. Service of a writ out of the jurisdiction is an interference with the exclusive jurisdiction of the sovereign power of the State where the service is effected. As a matter of international comity such service should not be allowed unless it is clearly within both the letter and the spirit of Or. XI, r. I.

Per Goddard L.J. The words " tort committed within the " jurisdiction " in r. I (*ee*) of Or. XI must be limited to a wrongful act committed within the jurisdiction, and do not extend to a case where the wrongful act was committed out of the jurisdiction but the damage resulting therefrom took place within the jurisdiction.

Per du Parcq L.J. An application under Or. XI, r. I, for leave to serve a writ out of the jurisdiction should never be granted without full knowledge and careful consideration of all the relevant circumstances.

APPEAL from Birkett J. in chambers.

The plaintiffs, Geo. Monro, Ld., were a company carrying on business in this country. The defendants, the American Cyanamid and Chemical Corporation, an American corporation carrying on business in the State of New York, were the manufacturers of a product known as cyanogas which was used for the destruction of vermin. On February I, 1938, the plaintiffs entered into an agreement with the corporation by which the plaintiffs were appointed sole distributors of cyanogas in the British Isles, the plaintiffs buying the goods from the corporation and the property in the goods passing in America. The agreement contained a clause "that the "contract should be construed and the respective rights of "the parties hereto determined according to the law of the "State of New York." At some date before December, 1940, the plaintiffs as distributors sold a quantity of cyanogas to Boots Cash Chemists, Ld. In the autumn of 1940 a farmer named Wynn entered into an agreement with the Shropshire county council for the "de-ratting" of his farm, and the county council on various dates bought cyanogas from Boots Cash Chemists. On September 24, 1941, Wynn began proceedings in the High Court against the Shropshire county council, alleging that he had suffered damage by reason of the negligence of the council in the execution of his agreement with them. In December, 1941, the council served a third party notice on the present plaintiffs claiming an indemnity against the claim of Wynn or a contribution. Lawrence J., who tried that action in December, 1942, gave judgment for Wynn against the council and ordered that the present plaintiffs should contribute one half of the damages and costs. The plaintiffs then began an action against the corporation to recover sums of money paid by them (the plaintiffs) in respect of that judgment. The writ was endorsed "for "damages for negligence and breach of contract." The plaintiffs applied to a master for leave to serve notice of the writ out of the jurisdiction, under R. S. C., Or. XI. r. 1, and an affidavit was filed in support of that application stating the facts hereinbefore set out with reference to the action by Wynn. The only additional statements in the affidavit relevant to the present case were that solicitors in London, whom the plaintiffs thought might accept service on behalf of the corporation, were instructed not to accept service, and that the deponent had the conduct of the proceedings and believed that the plaintiffs had a good cause of action. The affidavit, however, did not set out the terms of the contract between the plaintiffs and the corporation. On that affidavit the master gave leave to serve notice of the writ out of the jurisdiction. A conditional appearance was entered to that writ on behalf of the corporation, and an application was then made to the master to set aside the service. On that application an affidavit was filed setting out the terms of the contract. The master refused to set aside the service. Birkett J., in chambers, affirmed the order of the master. The corporation appealed.

C. A.

1944

GEORGE MONRO, LD. *v.* AMERICAN CYANAMID AND CHEMICAL CORP.

St. John Field K.C. and *Harold Brown* for the corporation. The order for the service of the writ in the action against the corporation ought never to have been made by the master under Or. XI, r. I, as, according to the terms of the contract between the plaintiffs and the corporation the contract was made in the State of New York, U.S.A., and was to be entirely performed in that State, the property in the goods passing to the plaintiffs in that State. The contract further provided that it should be construed and the rights of the parties determined according to the laws of the State of New York. Therefore, the action for breach of contract does not come within Or. XI, r. I (*e*). The writ in the action was also endorsed with a claim for damages for the negligence of the corporation, but no particulars were given in the writ nor in the affidavit filed in support of the application for service of the writ out of the jurisdiction to show that the corporation had committed a tort within the jurisdiction within r. I (*ee*) of Or. XI.(1)

Ryder Richardson for the plaintiffs. It is not now sought to rely in this action on a breach of contract as it is now clear that that breach of that contract, if any, did not take place within the jurisdiction. The plaintiffs will rely on a tort committed within the jurisdiction which, under r. I (*ee*) of Or. XI, will support the service of the writ out of the jurisdiction. The tort that was alleged by the plaintiffs was that the corporation manufactured and sold to the plaintiffs a dangerous

(1) By R. S. C., Or. XI, r. I: "Service out of the jurisdiction of "a writ of summons or notice of "a writ of summons may be "allowed by the court or a judge "whenever . . . . (*e*) The action "is one brought against a de-"fendant not domiciled or or-"dinarily resident in Scotland "to enforce, rescind, dissolve, "annul or otherwise affect a "contract or to recover damages "or other relief for or in respect "of the breach of a contract— "(i.) made within the jurisdiction, "*or* (ii.) made by or through an "agent trading or residing within "the jurisdiction on behalf of "a principal trading or residing "out of the jurisdiction, *or* (iii.) by "its terms or by implication to "be governed by English law, or "is one brought against a de-"fendant not domiciled or or-"dinarily resident in Scotland or "Ireland, in respect of a breach "committed within the juris-"diction of a contract wherever "made, even though such breach "was preceded or accompanied "by a breach out of the juris-"diction which rendered im-"possible the performance of the "part of the contract which "ought to have been performed "within the jurisdiction. (*ee*) The "action is founded on a tort "committed within the juris-"diction. . . . ."

substance with instructions as to its use without giving a warning of the dangerous nature of the substance unless certain precautions were taken. That negligence was committed within the jurisdiction, and, therefore, the order for service of the writ out of the jurisdiction was properly made.

Scott L.J. This is an appeal from Birkett J. at chambers who affirmed an order of the master refusing to set aside the order for the service of the writ out of the jurisdiction which had previously been obtained by the plaintiffs against an American corporation. The writ was endorsed " for damages " for negligence and breach of contract." [His Lordship stated the substance of the affidavit filed in support of the application and continued :] On that affidavit, under the present procedure under Or. xi, by which leave to serve out of the jurisdiction can be obtained from a master, the master gave leave to serve the writ out of the jurisdiction. In my view, that affidavit is gravely defective in the amount of information which ought to be given in an affidavit supporting an application for leave to serve notice of a writ out of the jurisdiction, and the defect is not made less by anything contained in the subsequent affidavit. An essential feature of the agreement made on February 1, 1938, was an express provision that " the contract should be construed and the " respective rights of the parties hereto determined according " to the law of the State of New York." That in itself would naturally make the courts in this country incline to be specially careful about giving leave to serve a writ out of the jurisdiction. Under that contract there was no term which called for the performance of the contract in the United Kingdom, and, therefore, the provision of Or. xi, r. 1 (*e*), about a breach of contract within the jurisdiction has no application. Similarly, there is no evidence that the contract was made anywhere except in the United States. Therefore no ground within Or. xi, r. 1 (*e*) (i.), for giving leave for service out of the jurisdiction can be based on the contract. The argument before us has, accordingly, been limited to the claim in tort vaguely endorsed without any further particulars. In the particulars given in the affidavit about the proceedings in this country resulting from sales through the plaintiffs to Boots Cash Chemists, Ld., there is nothing to indicate that anything took place in this country which could be clearly attributed to the American corporation as a tort committed within the jurisdiction. Even if it were possible to argue that any cause of action based solely on tort could be said to have arisen within the jurisdiction, it is not enough to satisfy the requirements of Or. XI. I express no opinion whether, if an act were committed out of the jurisdiction which did not give rise to a cause of action in tort until something further had happened within the jurisdiction, the resultant damage could properly be regarded as flowing from a tort taking place within the jurisdiction. It is not necessary to decide that question in the present case. The wording of r. 1 (*ee*) of Or. XI. is : "The action is founded on a tort committed "within the jurisdiction." Great care is necessary in applying that sub-rule. In the present case there is not even now clear evidence before the court that the damage claimed in the proceedings between the farmer and the Shropshire county council and the present plaintiffs were due to a tort committed by the American corporation within the jurisdiction. Prima facie the corporation did nothing except manufacture the material. How it was used, what had happened to it, whether it had been interfered with in any way within this jurisdiction, there is no evidence.

Even assuming that the material was not in any way misused or tampered with, still I think it would be right, in the discretion of the court, to refuse leave to serve the writ out of the jurisdiction if the cause of action in tort in respect of what was done in the manufacture of the goods in America could only be said to arise in this country because the damage arose here. I say that for this reason. Service out of the jurisdiction at the instance of our courts is necessarily prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected. I have known many continental lawyers of different nations in the past criticize very strongly our law about service out of the jurisdiction. As a matter of international comity it seems to me important to make sure that no such service shall be allowed unless it is clearly within both the letter and the spirit of Or. XI. This is not the kind of case where service ought to be permitted outside the jurisdiction unless quite exceptional circumstances are shown, and certainly not on such a seriously defective affidavit as was filed in the present case. It is most important that the realities of the case should be considered. So far as I can judge, the agreement made between the plaintiffs and the corporation was one by which the corporation were seeking carefully, with the consent of the plaintiffs, to keep all claims against them within the exclusive jurisdiction of the courts of the United States. For these reasons I think this appeal must be allowed.

Goddard L.J. I agree. I wish that it had been possible for us to have had some information as to the ground on which the master and Birkett J. refused to set aside the service of the writ. I still more wonder how it ever came about that an order for service out of the jurisdiction was made on this affidavit. The rule is perfectly clear that no leave should be granted unless it should be made to appear to the court or judge that the case is a proper one for service out of the jurisdiction under the order. There is nothing in this affidavit to show that the case comes within the order. All we know, looking at the affidavit which was filed on the application, is that the plaintiffs seek to recover sums of money which they have been ordered to pay to a certain other person in this country as damages sustained by that other person by reason of the negligence and breach of contract of the American corporation. A contract was referred to in the affidavit (it was not then exhibited, but it was exhibited in the proceedings to set aside the writ) in which it appeared that the breach of contract, if any, occurred in America and nowhere else, and Mr. Ryder Richardson has not attempted to support the order on the ground that there was any breach of contract within the jurisdiction. If the master had seen the contract I am sure he would have come to that conclusion because it is clear on the contract. It is also clear that the parties provided that the contract should be construed, and the respective rights of the parties thereto determined, according to the law of the State of New York. That would not have prevented service out of the jurisdiction if the breach had been committed within the jurisdiction, but, as the contract provided for the passing of the property in New York, it is impossible to see how any breach of contract occurred within the jurisdiction.

Therefore, we are left with a claim against the corporation for negligence. We are not told in what respect it is alleged that they have been negligent. All that the affidavit has recited is that the farmer brought an action against the Shropshire county council for negligence in "de-ratting" his farm. The county council joined the plaintiffs in the present action, claiming an indemnity against them. We do not know why. We are, I suppose, asked to infer that it was because something which the plaintiffs supplied to the county council was dangerous or defective, but the affidavit does not say so. We do not know on what grounds the farmer sued the county council, still less do we know the ground on which the county council joined the plaintiffs or on what ground the learned judge gave judgment against them.

It would be sufficient to dispose of this appeal to say that the affidavit which was before the master who gave leave to serve out of the jurisdiction does not show that the claim brought against the corporation comes within Or. XI. I do not want to decide the case merely on that ground, because from what counsel has told us, we now know that the negligence alleged by the plaintiffs is that the corporation sold in America, the property passing in America, a substance which was dangerous and in respect of which it is said that a warning ought to have been given. The only words of Or. XI, r. 1, which could have any relevance in this case seem to me to be para. (*ee*). One of the grounds on which a writ can be ordered to be served out of the jurisdiction is that: " the action is " founded upon a tort committed within the jurisdiction." I am satisfied that those words ought to be read as referring to a tortious act committed within the jurisdiction. In this respect I would like to refer to what I said in *Draper* v. *Trist and Trisbestos Brake Linings, Ld.* (1). I venture to cite it because I said it without any dissent from either the Master of the Rolls or Clauson L.J., who were the other members of the court: " I find it of some assistance in coming to a conclusion " in this case to analyse in my own mind what exactly is the " cause of action and the right of action, which are two different " things. The action is one of that class which is known as " an action on the case, akin to an action of deceit. In an " action on the case, the cause of action is the wrongful act " or default of the defendant. The right to bring the action " depends on the happening of damage to the plaintiff." Here the alleged tort which was committed was a wrongful act or default. It was the sale of what was said to be a dangerous article without warning as to its nature. That act was committed in America, not in this country. I think, as du Parcq L.J. said in the course of the argument, that all that this rule is aiming at is the case where a foreigner comes

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(1) (1939) 56 R. P. C. 429, 442.

C. A.

1944

George Monro, Ld. v. American Cyanamid and Chemical Corp.

Goddard L.J.

to this country and commits a tort in this country, for instance, in driving a motor car and running some one down by negligent driving. That is not exhaustive. The tort may be a libel published by him here. Many things may be done here, but it does not seem to me that in this case the facts, as far as we know them, show that any tort was committed within the jurisdiction.

One reason for construing the words of Or. XI "committed "within the jurisdiction" as being limited to a wrongful act committed within the jurisdiction is that, although American law is founded on our common law, it does not follow that in the development of the common law, the same view has been taken of the law of torts in all respects by American courts as has been taken in our courts. In fact, if anyone peruses Dr. Goodhart's excellent work, "Essays in Jurisprudence and "the Common Law," they will find instances set out where the Court of Appeals in New York have taken views on some matters relating to the law of torts different from those which have been taken in England. It may be that in some cases an act which would be regarded as tortious in England would not be regarded as tortious in America, and vice versa. Therefore it would be a very strong thing for an English court to exercise jurisdiction over an American in respect of an act committed by him in America, although some damage might be alleged to be suffered in England, when the act in America might not be considered by the courts of that country to be tortious at all. Accordingly, I think that leave to serve the writ out of the jurisdiction ought never to have been given, and that this appeal should be allowed and the writ set aside.

du Parcq L.J. I agree. There is now no suggestion that the claim endorsed on this writ can be brought within Or. XI, r. 1 (*e*), but reliance is now placed solely on sub-rule (*ee*), that is to say, it is said that the action is founded on a "tort "committed within the jurisdiction," the alleged tort being negligence. I agree with what has been said by my brethren, that the affidavit does not show what the alleged negligence is. Having been instructed by Mr. Ryder Richardson on the subject, I am willing to infer that the negligence alleged is that the corporation put on the market a dangerous substance with written instructions to use it in a dangerous way. That act of commission was done in America and it is highly artificial to say that the tort was committed within the jurisdiction of the English courts. The principle of the rule is plain. Looking at the substance of the matter without regard to any technical consideration, the question is : Where was the wrongful act, from which the damage flows, in fact done ? The question is not where was the damage suffered, even though damage may be of the gist of the action.

To show that I most heartily agree with what has been said by my brethren as to the importance of this appeal, I wish to add this. Jurisdiction in respect of service abroad is now exercised by the masters. From 1852 until, I think, 1937 it had always previously been exercised by a judge of the High Court. I say nothing as to the desirability of the change in the rule except that I am sure that it must not be regarded as indicating that the rule-making authority intended to minimize the gravity of the jurisdiction. Whoever exercises that jurisdiction, it should always be remembered that an application under the rule should never be granted without full knowledge and careful consideration of all the relevant circumstances. Goddard L.J. has already referred to Or. XI, r. 4, which itself makes the matter plain enough, but it is well to remind those who now exercise the jurisdiction of the important observations made in this court in 1908 by Farwell L.J., in *The Hagen* (1) when he said that during what were then the present sittings Vaughan Williams L.J. and he had on more than one occasion to consider Or. XI and had come to the conclusion which he then put under three heads. In the first of the three heads the court adopted the statement of Pearson J. in *Société Générale de Paris* v. *Dreyfus Brothers* (2). I need only say that there Pearson J. called attention to the high importance of the matter, and said that the "court "ought to be exceedingly careful before it allows a writ to be "served out of the jurisdiction." The second point was that "if on the construction of any of the sub-heads of Or. XI "there was any doubt, it ought to be resolved in favour of "the foreigner." The third point was that "full and fair "disclosure is necessary," that is, full and fair disclosure in the affidavit in support of the application, and that "a failure "to make such full and fair disclosure would justify the court "in discharging the order, even although the party might "afterwards be in a position to make another application." I would only add to that a reference to what was said by

(1) [1908] P. 189, 201.

(2) (1885) 29 Ch. D. 239, 243.

C. A.

1944

GEORGE MONRO LD. *v.* AMERICAN CYANAMID AND CHEMICAL CORP.

du Parcq L.J.

Lord Haldane in *Johnson* v. *Taylor Brothers* (1) in the House of Lords: "Order XI. r. 1, does not lay down in imperative "terms a new principle of law as to be applicable in all cases. "What it does is, while leaving intact the old principle that "by the law of England jurisdiction depends, broadly "speaking, on presence within the jurisdiction, to enable the "court to give special leave for service out of the jurisdiction "in certain circumstances. The court may do so, that is to "say that the court has a new power which it is enabled to "exercise in particular cases which seem to it to fall within "the spirit as well as the letter of the various classes of case "provided for. This appears to me to entitle the court to "refuse to give such leave in an instance in which the "proceeding, though for a breach within the jurisdiction and "in the letter within the terms of the rule, is in substance "not so." I need not, perhaps, have read that last sentence, because in the present case it is plain that this application fell neither within the spirit nor within the letter of the rule, but it is as well that it should always be before the mind of the master who is dealing with an application of this character. I agree that the appeal should be allowed with costs.

Appeal allowed.

Solicitors for plaintiffs: *Watson, Sons & Room.*
Solicitors for American Corporation: *R. C. Bartlett & Co.*

(1) [1920] A. C. 144, 153.

R. F. S.

C. C. A.

1944

Jan. 31; *Feb.* 4.

REX *v.* HADDY.

Criminal law—Appeal—"Substantial miscarriage of justice"—Application of proviso to s. 4, sub-s. 1 of Criminal Appeal Act, 1907—*Criminal Appeal Act,* 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 1.

There is no substantial miscarriage of justice within the meaning of the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, if the court comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty. Hence, on an appeal against a conviction of larceny, where the appellant's defence was a denial of his identity with the thief, but where the Court of Criminal Appeal was of opinion that the evidence of identity was overwhelming, the court applied the proviso and affirmed the conviction on the ground that no substantial miscarriage of justice had

C. C. A.

1944

REX
v.
HADDY.

actually occurred, although of opinion that, by reason of a faulty summing-up to the jury by the judge, the appeal might be decided in the appellant's favour.

Statements of law by Channell J. in *Rex* v. *Cohen and Bateman* (1909) 2 Cr. App. R. 197, 207, approved.

Woolmington v. *Director of Public Prosecutions* [1935] A. C. 462, explained.

APPEAL against conviction.

The appellant, Albert Edward Haddy, was convicted at the Central Criminal Court of the larceny on August 23, 1943, of an attaché case and 2,000*l.* His defence was a denial of his identity with the thief. He appealed against his conviction on the ground that the recorder "had wrongly invited the "jury to infer the appellant's guilt from a consideration of "his silence after being cautioned." The court came to the conclusion that the summing-up did offend against the rule laid down in *Rex* v. *Naylor* (1) on this point, and that they ought to allow the appeal unless the proviso to s. 4, sub-s. 1 of the Criminal Appeal Act, 1907, applied (2).

Maude K.C. and *Edie* for the appellant. The proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907 (2) is not applicable because it is impossible for this court to say that "if the jury had been properly directed they would have "inevitably come to the same conclusion": per Viscount Sankey L.C. in *Woolmington* v. *Director of Public Prosecutions* (3), a passage adopted without comment by this court in *Rex* v. *Leckey* (4).

Alban Gordon for the Crown. The proviso to s. 4, sub-s. 1, is applicable, because no substantial miscarriage of justice has

(1) [1933] 1 K. B. 685.

(2) Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4: "(1) The "Court of Criminal Appeal on any ". . . . appeal against conviction "shall allow the appeal if they "think that the verdict of the "jury should be set aside on the "ground that it is unreasonable or "cannot be supported having "regard to the evidence, or that "the judgment of the court before "whom the appellant was convicted should be set aside on the "ground of a wrong decision of "any question of law or that on "any ground there was a miscarriage of justice, and in any "other case shall dismiss the "appeal: Provided that the "court may, notwithstanding that "they are of opinion that the "point raised in the appeal might "be decided in favour of the "appellant, dismiss the appeal if "they consider that no substantial "miscarriage of justice has "actually occurred."

(3) [1935] A. C. 462, 482–3.

(4) Ante p. 80, 86.

actually occurred. Even the House of Lords cannot override the clear meaning of the words of the proviso, "the court "may . . . . dismiss the appeal if they consider that no "substantial miscarriage of justice has actually occurred." The standard set by the House of Lords is much higher than that, and, if adopted, would render the proviso almost nugatory.

Cur. adv. vult.

Feb. 4. HUMPHREYS J., delivering the judgment of the court (HUMPHREYS, ASQUITH and CASSELS JJ.), said that the court took the view that they ought to allow the appeal, subject to the application of the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, and continued :—In s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, are to be found the grounds on which the Court of Criminal Appeal are to allow an appeal. One of those grounds is that the court shall allow the appeal if they think that there was a miscarriage of justice at the trial. The proviso to the sub-section runs as follows : "Provided that the court may, notwithstanding "that they are of opinion that the point raised in the appeal "might be decided in favour of the appellant, dismiss the "appeal if they consider that no substantial miscarriage of "justice has actually occurred." The two key words in that sentence seem to be "substantial," as a description of the miscarriage of justice, and "actually."

Mr. Maude, for the appellant, argued that we could not give effect to the proviso unless the court was prepared to hold that no jury properly directed could have acquitted the appellant. He based that argument on a passage in the opinion of Viscount Sankey L.C. in the House of Lords in *Woolmington* v. *Director of Public Prosecutions* (1), where, after reading the proviso to the sub-section, he said : "The "Act makes no distinction between a capital case and any "other case, but we think it impossible to apply it [the "proviso] in the present case. We cannot say that if the "jury had been properly directed they would have inevitably "come to the same conclusion." It is the word "inevitably" in that sentence on which Mr. Maude relied. In our opinion, it would be wrong to give effect to that argument. To accept it would be to render the proviso practically otiose, for it can never be said with certainty in any criminal case, however

(1) [1935] A. C. 462, 482–3.

strong the evidence for the prosecution, that no jury could be found to acquit. The Lord Chancellor, we are satisfied, was referring, not to a jury who might return a perverse verdict but to a jury of sensible persons anxious to do their duty which is, in the language of the juror's oath, to return a true verdict according to the evidence. If that be the correct view, the word "inevitably" becomes merely an adverb of emphasis designed to express the necessity for the absence of any doubt on the part of the court that a reasonable jury properly directed would have returned the same verdict. In *Rex* v. *Dyson* (1), in the early days of this court, Lord Alverstone C.J. used this phrase in delivering the judgment of the court: "The proviso is intended to apply to a case in which the "evidence is such that the jury must have found the prisoner "guilty if they had been properly directed," but in *Rex* v. *Stoddart* (2) he observed: "We think it is open to considera-"tion whether the word 'must' [in *Rex* v. *Dyson* (1)] is not "too strong, and whether the proper question is not, whether "if properly directed the jury would have returned the same "verdict."

It seems to us to matter very little what precise words are used so long as the language of the proviso is satisfied and the court is sure that there has been no "substantial mis-"carriage of justice." The proper interpretation of those words in the proviso was the subject of a considered judgment of this court in *Rex* v. *Cohen and Bateman* (3). I find these words of Channell J. in the judgment of the court, the other members of which were Jelf J. and Bray J.: "We have had "an opportunity of carefully discussing this case, and we "have arrived at our conclusion. Under the statute only one "judgment is delivered, and we have, therefore, put into "writing our judgment upon the construction of s. 4, sub-s. 1, "of the Criminal Appeal Act." The learned judge referred to the provision as to setting aside a conviction on the ground of a wrong decision of a question of law and continued: "A mistake of the judge as to fact, or an omission to refer to "some point in favour of the prisoner, is not, however, a wrong "decision of a point of law, but merely comes within the very "wide words 'any other ground,' so that the appeal should "be allowed according as there is or is not a 'miscarriage of

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(1) [1908] 2 K. B. 454, 457.

(2) (1909) 2 Cr. App. R. 217, 245.

(3) (1909) 2 Cr. App. R. 197, 207.

" 'justice.' There is such a miscarriage of justice not only " where the court comes to the conclusion that the verdict of " guilty was wrong, but also when it is of opinion that the " mistake of fact or omission on the part of the judge may " reasonably be considered to have brought about that verdict, " and when, on the whole facts and with a correct direction, " the jury might fairly and reasonably have found the appellant " not guilty. Then there has been not only a miscarriage of " justice but a substantial one, because the appellant has lost " the chance which was fairly open to him of being acquitted, " and therefore, as there is no power of this court to grant a new " trial, the conviction has to be quashed. If, however, the " court in such a case comes to the conclusion that, on the " whole of the facts and with a correct direction, the only " reasonable and proper verdict would be one of guilty, there " is no miscarriage of justice, or at all events no substantial " miscarriage of justice within the meaning of the proviso." That statement of the law has stood for thirty-five years and, so far as we are aware, has never been the subject of adverse comment, though judges in giving the decisions of the Court of Criminal Appeal have used varying language and many different expressions, including the word " inevitably " which does not occur for the first time in the opinion of Viscount Sankey in *Woolmington's* case (1). We are convinced that it was not the intention of the Lord Chancellor in that case, or of the other members of their Lordships' House who concurred in his opinion, to lay down any different interpretation of the expression " miscarriage of justice."

Having considered the facts of this case and the evidence given at the trial, which was overwhelming on the question of identity, and the whole of the summing-up which, apart from the one passage complained of, was fair and accurate, we are satisfied that no reasonable jury properly directed throughout would, or could, have come to any other conclusion than that to which they did come and that no miscarriage of justice has actually occurred. We, accordingly, dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Smithdale, Rutledge & Co.*
Solicitor for Crown: *Solicitor to Metropolitan Police.*

W. L. L. B.

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(1) [1935] A. C. 462, 482–3.

CHESTERTON RURAL DISTRICT COUNCIL *v.* RALPH THOMPSON, LIMITED.

1944
March 17.

Quarter sessions—Statement of case—Common law—Time.

The appeal committee of quarter sessions were not asked to state a case for the opinion of the High Court at the time they announced their decision on an appeal from a court of summary jurisdiction, but seven days later, before the committee were functi officio, the appellants applied in writing for a case, which was stated accordingly. At the hearing in the High Court a preliminary objection was taken that the appeal committee had no jurisdiction to state the case :—

Held, that, as the application for the case had been made within a reasonable time and before the committee were functi officio, the objection must be overruled.

CASE stated by Cambridge quarter sessions.

On May 21, 1943, the appellants, Chesterton Rural District Council, appealed to Cambridge quarter sessions against a decision of a court of summary jurisdiction in favour of the respondent company. When the appeal committee of quarter sessions had given their decision no application was made by the appellants for a case to be stated for the opinion of the High Court, and, therefore, the order of the court did not refer to that matter. On May 28, 1943, before the committee were functi officio, the appellants applied in writing to quarter sessions to state a case, and the present case was stated. When the matter came before the Divisional Court.

Squibb for the respondents, took the preliminary objection that quarter session had no jurisdiction to state the case. The case purported to have been stated under the common law jurisdiction of quarter sessions, none of the statutes conferring the power to state a case being applicable. Originally quarter sessions used to obtain the opinion of the High Court by adjourning the case to the assizes, but gradually the present practice of stating a case in writing grew up : per Field J. in *Reg.* v. *Chantrell* (1). In *London & North Western Ry* v. *Ampthill Union* (2), the court observed that quarter sessions had dismissed the appeal without making any provision for stating a case and the master of the Crown Office, who was present, said : " The sessions is now functus, and cannot " interfere with the order except for the statement of this " case. If the court like it to be sent back to the clerk of the

(1) (1875) L. R. 10 Q. B. 587, 588.

(2) (1907) 2 Konst. Rating Appeals, 378, 384.

1944

CHESTERTON R. D. C. *v.* RALPH THOMPSON, LD.

"peace and desire him to amend the order, the court can hear "the argument nunc pro tunc; but it is a very great "irregularity, and I have never known the court to accede "to it." The court decided that the order of quarter sessions must be amended before the order of the High Court could be drawn up. The hearing then proceeded, apparently by consent. In Willway's Quarter Sessions Practice, p. 307, it is said: "It is essential that a party desiring a case should "ask for it at the time judgment is given, or at the latest, "before the session is concluded." Various statutes—e.g. the Criminal Justice Act, 1925, s. 20, and the Rating and Valuation Act, 1925, s. 31, sub-s. 5—fix the number of days within which a case must be applied for. If the respondent is right this was unnecessary. He referred to *Rex* v. *Lincoln Justices, Ex parte Trafford* (1).

Sydney Turner K.C. and *Simes* for the appellants. At common law quarter sessions have an unfettered discretion to grant or refuse a case, and mandamus to grant a case would not lie. Application to state a case must be made within a reasonable time, and the seven days in the present case was a reasonable time. In *London & North Western Ry.* v. *Ampthill* (2) the court treated the matter as a mere technicality, and proceeded with the appeal. No authority for the passage in Willway relied on was given.

THE COURT (VISCOUNT CALDECOTE C.J., MACNAGHTEN and CASSELS JJ.) overruled the objection.

VISCOUNT CALDECOTE C.J. We think we should hear this appeal. The application was made to the appeal committee within a reasonable time and before they were functi officio, that is to say, the appeal committee were appointed for a period and the application was made to them before the period had expired. We do not think that *Rex* v. *Lincoln Justices, Ex parte Trafford* (1) has any bearing on the point which we have to consider.

The hearing then proceeded.

Solicitor for appellants: *J. J. McIntyre.*

Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth, for W. J. and J. G. Taylor, Newmarket.*

(1) Ante, p. 243.

(2) (1907) 2 Konst. Rating Appeals, 378, 384.

W. L. L. B.

SIGNY *v.* ABBEY NATIONAL BUILDING SOCIETY.

C. A.

1944

Feb. 10; *March* 10.

Landlord and tenant—Rent restriction—Standard rent—Dwelling-house first let furnished—Subsequent letting unfurnished—Increase of Rent and Mortgage Interest (*Restrictions*) *Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*a*)—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 1 ; *sch. I.*

A dwelling-house controlled by the Rent and Mortgage Interest Restrictions Act, 1939, was first let furnished and afterwards was let unfurnished :—

Held, that as s. 12, sub-s. 2, proviso (i) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, makes the Rent Restrictions Acts inapplicable to a furnished house, the "standard rent" defined in s. 12, sub-s. 1 (*a*), of the Act (applied to the dwelling-house with modifications by s. 3, sub-s. 1, and sch. I, of the Act of 1939) was the rent at which the dwelling-house was first let unfurnished :—

APPEAL from Willesden county court.

On January 8, 1940, a dwelling-house, No. 18 Western Avenue, Golders Green, was let, furnished, to one S., at a weekly rent of 2*l.* 10*s.* inclusive of rates. The house had not been let previously. In September, 1942, the National Building Society let the house, unfurnished, to the plaintiffs, Joseph M. Signy and his wife, for the term of three years at a yearly rent of 115*l.* payable monthly in advance, the plaintiffs to pay the rates and keep the interior of the house in repair. On October 1, 1943, the plaintiffs issued a summons in the county court asking to have the standard rent of the house ascertained. The county court judge held that the house was controlled by the Rent and Mortgage Interest Restrictions Act, 1939 ; that a furnished letting could be a first letting within s. 12, sub-s. 1 (*a*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1) (applied to the house with modifications by s. 3, sub-s. 1, and sch. I. of the Act of 1939), notwithstanding

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (*a*), as modified by Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 1, sch. I. : "The expression "'standard rent' means the rent "at which the dwelling-house was "let on September 1, 1939, or "where the dwelling-house was not "let on that date, the rent at "which it was last let before that "date, or, in the case of a dwelling-"house which was first let after "the said September 1, the rent "at which it was first let."

By s. 12, sub-s. 2, proviso (i.) : "This Act shall not, save as other-"wise expressly provided, apply "to a dwelling-house bona fide "let at a rent which includes pay-"ments in respect of . . . . . . "furniture."

C. A.

1944

SIGNY v. ABBEY NATIONAL BUILDING SOCIETY.

s. 12, sub-s. 2, proviso (i.); and that, although the house was first let furnished at 2*l.* 10*s.* a week (130*l.* a year) inclusive of rates, the rent of 130*l.* was the standard rent. The National Building Society appealed. Afterwards this society amalgamated with the Abbey Road Building Society and the two societies transferred all their property and assets to a new society called the Abbey National Building Society. The Court of Appeal allowed the proceedings to be amended so as to make the new society the defendants and appellants.

Sebag Shaw for the defendants. For ascertaining the standard rent regard cannot be had to a furnished letting. Under s. 12, sub-s. 1 (*a*), of the Act of 1920, as modified by the Act of 1939, so as to make September 1, 1939, the critical date, regard must be had, for fixing the standard rent, to the first letting after that date. A furnished letting is not a letting within the Rent Restrictions Acts and cannot assist to fix the standard rent: see *Wheeler* v. *Wirrall Estates, Ld.* (1) when a letting, by the Crown, whose prerogative prevented the Rent Restrictions Acts from applying to the letting, was held not to be a first letting within s. 12, sub-s. 1 (*a*). A furnished house is a different entity from an unfurnished house, and the rent of the house furnished cannot be apportioned so as to ascertain the rent attributable to the house without the furniture.

Elliot Gorst for the plaintiff. Under s. 12, sub-s. 1 (*a*), of the Act of 1920, the standard rent is ascertained by reference to rent payable on a first letting even though that letting is outside the Act. It is enough that it was a first letting at a rent: *L. H. Woods & Co.* v. *City and West End Properties, Ld.* (2). The fact that something is let with the house does not prevent the standard rent being ascertained from the rent on that letting: see *Wilkes* v. *Goodwin* (3). Whatever is included in the rent issues out of the land: *Brown* v. *Peto* (4). The county court judge found that, to ascertain the standard rent, regard could be had to a letting outside the Act, and *Woodhead* v. *Putnam* (5) supports this view, but he ought to have apportioned the rent to ascertain the part attributable to the house alone: see *Barrett* v. *Hardy Brothers (Alnwick)*,

(1) [1935] 1 K. B. 294.
(2) (1921) 38 T. L. R. 98.
(3) [1923] 2 K. B. 86.
(4) [1900] 2 Q. B. 653.
(5) [1923] 1 K. B. 252.

Ld. (1). [He also referred to *Sinclair* v. *Powell* (2), *Sutton* v. *Begley* (3), and *Davies* v. *Warwick* (4).]

Cur. adv. vult.

Mar. 10. The judgment of the court (LORD GREENE M.R., MACKINNON and LUXMOORE L.JJ.) was read by LUXMOORE L.J.: The question to be determined is whether, on the true construction of the Rent Restrictions Acts, the letting of the house, furnished, at an inclusive rental of 130*l.* a year on January 8, 1940, was its first letting for the purposes of fixing its standard rent under the Acts. The learned judge held that (*a*) the house became controlled under the Act of 1939, (*b*) it was not let before September 1, 1939, nor on that date, and (*c*) it was first let on January 8, 1940, at a rental of 130*l.* a year inclusive of rates and use of furniture. On these facts he held that the standard rent of the house was 130*l.* a year under and by virtue of the provisions of s. 12, sub-s. 1 (*a*), of the Act of 1920, as modified by the First Schedule to the Act of 1939.

The building society contend that the learned judge was in error in so holding and that the standard rent ought properly to be fixed at 115*l.* exclusive of rates, this being the rent reserved on the letting to the plaintiffs which the society contend is the first letting of the house for the purposes of the Acts. The basis of the judge's decision is that the words "first let" in s. 12, sub-s. 1 (*a*), of the Act of 1920 (as modified), refer to the first letting in fact without reference to the Rent Restriction Acts, and that, in its ordinary significance, "rent" includes the periodic payments in respect of a furnished house as well as of one that is unfurnished, for rent of a furnished house is deemed to issue entirely out of the realty and may therefore be distrained for: *Newman* v. *Anderton* (5). If this be the correct interpretation of s. 12, sub-s. 1 (*a*), surprising anomalies must necessarily result. For example, take the case of two precisely similar houses next door to one another in the same street. One is let for the first time unfurnished at 60*l.* per annum and the other is let also for the first time but furnished at 120*l.* per annum. The standard rent in the one case is 60*l.* and in the other 120*l.* Such a result would obviously be contrary to the whole policy and intendment of the legisla-

(1) [1925] 2 K. B. 220.

(2) [1922] 1 K. B. 393, 405.

(3) [1923] 2 K. B. 694, 700.

(4) [1943] K. B. 329.

(5) (1806) 2 Bos. & P. (N. R.) 224.

tion with regard to the fixing of rent for houses within the purview of the Rent Restrictions Acts.

In our judgment, the key to the true meaning of s. 12, sub-s. 1 (*a*) (as modified), is to be found when its object is considered. What the section is providing for is the fixing of the standard rent for dwelling-houses which fall within the scope of the Acts. Now it is provided that, except for certain purposes which are set out in ss. 9 and 10 of the Act of 1920, and to which it is immaterial for present purposes to refer, the Acts have no application to a dwelling-house bona fide let at a rent which includes payments in respect of the use of furniture: see s. 12, sub-s. 2, proviso (i.), of the Act of 1920. It is to be observed that there is no express reference in this proviso to a " furnished house " or to a " house let furnished," expressions in common daily use. The reference is to a " dwelling-house bona fide let at a rent which includes payments in respect of . . . . use of furniture." The words of the proviso are obviously more suitable to describe a house let with some articles of furniture in it than to one completely furnished. In *Wilkes* v. *Goodwin* (1) a maisonette had been let to a tenant at a rent of 80*l.* a year to include the use of the linoleum with which certain of the floors was covered. The Court of Appeal held that, unless the linoleum was so trifling in quality or value as to be negligible, which was a question of fact for the county court judge, its use was sufficient to satisfy the words " use of furniture " in the proviso and the premises were excluded from the operation of the Acts. Bankes L.J. called attention in his judgment to the wording of the proviso and to the reference in the side note to s. 9 of the Act of 1920, namely, " Houses let furnished." In addition to this side note there is a reference in the side note to s. 10 of the same Act " furnished lettings." The lord justice said: " In the popular sense a house is not 'let furnished' unless it is more or less completely furnished. It cannot be disputed that s. 9 must apply to houses partially or incompletely furnished as well as to furnished houses. This conclusion drives me back upon the question what is meant by the expression in the body of s. 9, sub-s. 1, and in the proviso to s. 12, sub-s. 2 (*a*), 'payment for the use of furniture.' I cannot think that this expression was intended to refer to houses let furnished. On the contrary, it appears to me to have been deliberately selected to indicate something different from the letting of a furnished house." The context shows that the lord justice is not there saying that a house let furnished is not excluded from the Act, but that the words are not limited to a house let furnished so as to exclude from the section a house let partially or incompletely furnished, for he states that houses let furnished in the popular sense are within the scope of both sections. Scrutton L.J. said (1): " In my view " . . . . furniture is not confined to the complete furniture " of a furnished house," while Younger L.J. held that the sections in question applied only to furnished houses in the popular sense.

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(1) [1923] 2 K. B. 86, 95.

It is, I think, necessary to keep these considerations in mind when construing the material section. The expression " standard rent " is defined thereby to mean " the rent at " which the dwelling-house was let on September 1, 1939, or " where the dwelling-house was not let on that date, the rent " at which it was last let before that date, or " (and this applies to the present case) " in the case of a dwelling-house " which was first let after the said September 1, the rent at " which it was first let." The object is plainly to fix the standard rent of a dwelling-house to which the Acts apply, that is, having regard to the proviso (i.) to sub-s. 2 of s. 12, a dwelling-house without the use of furniture. It seems to us that the section read as a whole is fixing the rental value of the house, so long as that value does not include any substantial payment for use of furniture, as the criterion for deciding the question whether a house falls within the Acts or not. In the case of a house let completely furnished at an inclusive rent, it is obvious that a substantial part of that rent must be attributable to the fact that the house is so furnished. If the answer to the question whether a particular house falls within the Acts or not depends on an examination of the circumstances in which the rent was fixed with regard to the subject-matter of the letting, the same consideration must logically be applied to the subject-matter of the first letting and the rent reserved thereby. A letting of a dwelling-house completely furnished is a letting of something more than the dwelling-house, for it includes also the letting of the furniture in it. In s. 12, sub-s. 1 (*a*), the first letting which is to fix the " standard rent " of a dwelling-house within the purview of the Acts, namely, an unfurnished dwelling-house, is the first letting of the dwelling-house and nothing else, and we can find no justification for reading the section as if the

(1) Ibid. 96.

C. A.

1944

SIGNY
v.
ABBEY
NATIONAL
BUILDING
SOCIETY.

words "whether furnished or unfurnished" are to be implied.

A careful consideration of the Acts, including especially the provisions of ss. 9 and 10 and s. 12, sub-s. 2, proviso (i.), seems to us to impose a restricted meaning on the word "rent," for otherwise the standard rent of an unfurnished house to which alone the Acts apply would be fixed if the first letting at the material date should happen to be of that house furnished, with reference to the rent of a furnished house to which the Acts have no application. For these reasons we hold that the first letting material to be considered in the present case is the letting to the plaintiffs of the house unfurnished, and, consequently, that the standard rent ought to be fixed at 115*l.*, with such addition as is necessary to provide for the fact that the tenant is responsible for the rates attributable to the house. The appeal must be allowed, and the plaintiffs must pay the costs here and below.

Appeal allowed.

Solicitors: *Tucker, Turner & Co.; F. Bernard Smith.*

H. C. G.

C. A.

1944
Mar. 2.

DICKINSON AND ANOTHER v. ST. AUBYN AND ANOTHER.

Landlord and tenant—Lease—Term of seven years—Option to tenant to terminate at end of five years—Covenant to deliver up fixtures "at "end or sooner determination of tenancy"—Covenant to paint "in "the last quarter of the said term"—Applicability of covenants to shortened term.

By a lease dated September 29, 1937, landlords demised to a tenant a flat for the term of seven years with a proviso that the tenant might terminate the tenancy after the expiration of five years. By cl. 3 of the lease the tenant covenanted to keep the interior of the premises and certain fixtures and fittings in good and substantial repair and condition "and in the like condition "to deliver up the same at the end or sooner determination of "the tenancy." By cl. 4 the tenant undertook "to paint in the "last quarter of the said term . . . . all the wood and inside "ironwork of the said premises . . . ." The tenant having given notice to determine the tenancy at the end of five years in accordance with the option contained in the lease, the landlords claimed damages for breach of the covenants in both cl. 3 and 4, and the tenant did not dispute liability in respect of that contained in cl. 3. With regard to cl. 4, Hilbery J. held that the effect of the exercise by the tenant of the option given by the proviso was to reduce the term of the lease to one of five years with the result that "the last quarter of the said term" in cl. 4 became the last quarter of the fifth year, and that the landlords, therefore, were entitled to damages for the breach of the covenant. On appeal :—

Held, on the construction of the lease, that the fact that in cl. 3 the language used was "at the end or sooner determination "of the tenancy" and in cl. 4 "in the last quarter of the said "term" indicated that the parties intended that the two clauses should bear different meanings ; that as an ambiguity existed the document must be construed strictly contra proferentes, with the result that the words "in the last quarter of the said term" in cl. 4 meant at the end of the term of seven years created by the lease, and that the tenant was under no obligation to paint before the expiration of that period.

Decision of Hilbery J., ante p. 10, reversed.

APPEAL from Hilbery J. (1).

By a lease, dated September 29, 1937, the landlords demised to the first defendant a flat for the term of seven years from the date of the making of the lease with a proviso "that if "the lessee shall desire to determine the term hereby granted "at the end of the fifth year thereof and shall give to the "lessors three months' previous notice in writing of his desire "then immediately on the expiration of such fifth year this "present demise shall cease and be void but without prejudice "to the rights of either party in respect of any antecedent "breach of covenant." By cl. 3 of the lease the lessee covenanted to keep the interior of the premises and certain fixtures and fittings in good and substantial repair and condition "and in the like condition to deliver up the same "at the end or sooner determination of the tenancy." By cl. 4 the lessee undertook "to paint in the last quarter of "the said term . . . . all the wood and inside ironwork of "the demised premises . . . ." The lease was assigned to the second defendant ("the tenant") who gave notice to determine it at the expiration of the fifth year of the tenancy. In the present action, the landlords claimed 77*l.* from the tenant for breaches of the covenants contained in cl. 3 and 4 of the lease, the sum of 15*l.* 19*s.* 9*d.* being referable to the alleged breach of the covenant in cl. 3, and the balance to the alleged breach of the covenant in cl. 4. The tenant did not dispute liability in respect of the covenant contained in cl. 3, but she pleaded that the covenant in cl. 4 to paint during the last quarter of the term granted by the lease did not apply to the last quarter of her tenancy since she had terminated the lease at the end of the fifth year. Hilbery J. held that the effect of the exercise by the tenant of the option given by proviso to the lease was to reduce the term of seven years to one of five years with the result that "the last quarter of "the said term" in cl. 4 became the last quarter of the fifth year, and, therefore, the landlords were entitled to the damages claimed in respect of breaches of both of the covenants sued on. The tenant appealed.

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(1) Ante p. 10.

Granville Sharp for the tenant. Hilbery J. was wrong in holding that the exercise of the option given to the tenant by the proviso in the lease operated to reduce the term of seven years, which was the term stated in the habendum, to one of five years. It is the habendum which must be looked at to ascertain what the term is, and what appears in the habendum must prevail. The words "the said term" in cl. 4 of the lease relate to something which had previously been defined and limited by the habendum, and cannot possibly be affected by the terms of the proviso. Clause 4 is explicit in its terms and it relates to an obligation to do interior painting, which is usually imposed on a tenant after the expiration of seven years, and the time when the painting is to be done is fixed by a date ascertainable by reference to the term of the lease as expressed in the habendum. Different language is used in cl. 3, the obligation under which is to arise at "the end or sooner determination of the tenancy." Had the landlords wished to do so they could have expressed the obligation under cl. 4 in the same terms, and the fact that different language is used shows that the intention was that the two clauses should have different meanings. The tenant left at the end of five years, and at that time she had committed no breach of the covenant to paint.

Diamond for the landlords. The decision of Hilbery J. was right. The words "the said term" in cl. 4 mean nothing more than "the term previously referred to" or "the term "hereby granted." A proviso is the strongest means known to the law to impose a condition, and by this proviso, if the lessee exercises the option which it gives him, the "last "quarter of the term" becomes the last quarter of a five years, tenancy. The proviso and the habendum must be looked at together to see what the term is, and the result is that "the "said term" in cl. 4 means seven years if the tenant does not exercise the option under the proviso and five years if he does.

GODDARD L.J. This case raises a very short point on the meaning of the words of a particular lease. No question of any general interest is involved, nor is it necessary for us to lay down any general principle. It is clear that so far as the tenant's liability under cl. 3 of the lease is concerned, there is no question that the flat had to be given up in good repair at the determination of the tenancy, but on cl. 4 the question arises whether "the said term" referred to therein means the term of seven years or the term which could be determined after the expiration of five years. In other words, the question is whether the obligation attaches, not only at the end of seven years if the lease runs its full term, but also at the end of the fifth year if the tenant gives notice to determine the term at the expiration of that period.

The first rule of construction to be borne in mind in construing this lease is that, to ascertain the intention of the parties and their contractual rights from the words which they have used, it is necessary to give effect to every word which is in the document. The second rule is that, if there is any ambiguity as to the meaning of the lease, it must be construed in accordance with what is generally called the rule contra proferentes, that is to say, against the persons who put the document forward. When the lease is read, the first thing that appears is that the words used in cl. 3 are different from those in cl. 4. In cl. 3, the words are that the tenant is to deliver up the interior of the premises and certain fixtures and fittings in good condition "at the end or sooner "determination of the tenancy," and there can be no doubt—it has not been argued to the contrary—that the tenant's obligation under this clause attaches when the tenancy is determined, whether that event occurs at the end of the seventh or of the fifth year. Different words, however, are found in cl. 4. It is a common thing in leases to provide for painting to be done at the end of particular periods, and frequently the period specified is one of seven years. In the present instance the tenant's obligation is "to paint in the "last quarter of the said term." There is no question, to my mind, that "the said term" there referred to is the term of seven years which has been previously granted under the lease.

Mr. Diamond, however, argues that, as the proviso enables the tenant to give notice to determine the term at the end of five years, we must read " the last quarter of the said " term " as meaning the last quarter of the term which has in fact existed, whether it be five years or whether it be seven. That would be reading the words as if they were " to paint " in the last quarter of the tenancy, be it five years or be it " seven years." That was the construction which Hilbery J. put on the words, but, in my opinion, it is not the right one. If parties to a lease use in one covenant an expression which shows that they have in mind obligations to arise at the end of the tenancy, whether that be at the end of one period or at the end of another according to whether or not the tenant exercises an option which is given to him, and in the next covenant they use an expression which, prima facie, applies only to the full term which is created by the lease, the proper rule of construction to apply is that they mean something different in the two covenants. In my view, the covenant to paint " in the last quarter of the said term " ought to be construed strictly against the landlords, and must mean that the tenant's obligation is to paint in the last quarter of the seventh year if he holds for the full period of seven years, but that he is under no obligation to paint in the last quarter of the term if he exercises his option and gives up the premises at the end of five years.

Another covenant in the lease provides that the tenant is " during the last month of the tenancy to permit any intending " tenant properly authorized to inspect the said premises at " reasonable hours in the day time." There the words are not " in the last month of the term " but " in the last month of " the tenancy " which again shews that the parties have in mind that the lease may come to an end before the expiration of the full term which it contemplates. There are, no doubt, other provisions in the lease in which " the term " can be seen to mean the duration of the tenancy. For instance, in the landlords' covenants there is one " to keep the outside " walls and roofs with the outside water pipes and shoots " and outside drains and sewers properly cleaned and repaired " . . . . at all times during the said term." That, of course, is a continuing obligation and the landlords would incur liability if, at any time during the tenancy, they did not keep in repair the parts of the premises specified. In my opinion, we are bound to construe the words " in the said term " in cl. 4 as referring to the term of seven years. The appeal will be allowed and the judgment of Hilbery J. varied by substituting the sum of 15*l.* 19*s.* 9*d.* for the amount for which he gave judgment.

DU PARCQ L.J. I agree. The reasonable construction of the covenant in cl. 4 is that which my Lord has stated. "The "said term," there must, as it seems to me, mean the period of time previously referred to. It is not possible to construe it as meaning "the estate hereby demised." The period of time which has been referred to is seven years, and the last quarter of "the said term," therefore, means the last quarter of the seven years. If the tenant has read the lease he knows that when that quarter is reached he must paint, and also that if he gives notice to terminate the lease after five years, he will never reach that quarter and the obligation to paint will no more arise than would an obligation continue to go on cleaning windows every two months after he had determined the lease. Mr. Diamond rather suggested that this construction was based on a narrow view and complained that it all turned on the one word "said." Even if that were so, it often happens that important decisions turn on one word, and it is as well that draftsmen should bear that fact in mind. In truth, however, I do not think that by the interpretation which we are putting on this lease we are giving to it a strained or improbable meaning. One has to have regard to the nature of the duty which is imposed on the tenant. Many landlords think it desirable that their houses or flats should be painted every seven years, and it is reasonable for the landlord to say to the tenant: "If "you are there for seven years, then at the end of the seven "years you must paint." If the lease is determined earlier, it may not be difficult for the landlord to make arrangements by which the liability to paint will be transferred to others, but that is not a matter which concerns us. I agree, therefore, that the appeal must be allowed so far as the obligation which it has been sought to put on the tenant under the covenant contained in cl. 4 is concerned.

VAISEY J. Whether our decision corresponds with the intention of the parties to this lease, I do not pretend to know, but we have to decide what is the true construction of the lease to which the parties have put their hands and seals.

C. A.

1944

DICKINSON v. ST. AUBYN.

Vaisey, J.

It seems to me that the wording of cl. 4, when contrasted with that at the end of cl. 3, is too strong and clear to admit of any speculation about any possible contrary intention of the parties. In my judgment, "the last quarter of the said "term" means the quarter which will begin at Midsummer, 1944, and end at Michaelmas, 1944, and on that ground it seems to me that this appeal must succeed.

Appeal allowed.

Solicitors for tenant: *Markby, Stewart & Wadesons.*
Solicitors for landlords: *Barnes & Butler.*

P. B. D.

C. A.

1944
Mar. 24;
April 24.

Scott, Luxmoore and du Parcq L.JJ.

HARDWICKE *v.* GILROY.

County Court—Jurisdiction—Counterclaim—Slander—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 40, *sub-s.* 1 (*c*); *s.* 63, *sub-ss.* 1 *and* 3.

The defendant, in her defence to an action in the county court for the return of money had and received and damages for negligence, pleaded a denial of liability and counterclaimed for damages for slander. The plaintiff did not apply under s. 63, sub-s. 1, of the County Courts Act, 1934, that the proceedings on the counterclaim be transferred to the High Court:—

Held, that under s. 63, sub-s. 3, of the Act the county court had jurisdiction to hear and determine the counterclaim.

APPEAL from Watford county court.

The plaintiff claimed from the defendant the return of money which the plaintiff had paid for turning a suit of clothes which he had entrusted to the defendant and damages for negligence whereby a part of the suit had, the plaintiff alleged, been spoilt. The defendant, by her defence, traversed the plaintiff's allegations and relied on a clause in a receipt, given by her for the suit, disclaiming all liability for loss or damage. She also counterclaimed 10*l.* as damages for a defamatory statement alleged to have been made by the plaintiff while in her shop. No application was made by the plaintiff for a transfer of the proceedings to the High Court. His Honour Judge Alchin held that, under s. 40, sub-s. 1 (*c*), of the County

C. A.
1944

HARDWICKE
v.
GILROY.

Courts Act, 1934 (1) he had no jurisdiction to hear and determine a counterclaim for slander, the increased jurisdiction given to county courts by s. 63 of the Act (1) having reference in his view only to counterclaims exceeding the monetary limit of the county court jurisdiction. He, therefore, ordered the counterclaim to be struck out, but stayed proceedings in the action pending an appeal by the defendant. The defendant appealed.

Fortune for the defendant. The decision of the county court judge on the counterclaim was wrong. Sub-section 1 of s. 40 of the County Courts Act, 1934, is not totally prohibitive, for it is qualified by the words " except as in this Act provided." Section 63, which extends the jurisdiction, is not limited, as the learned judge thought, to the monetary jurisdiction of the county court. It deals with all counterclaims which involve matters beyond the jurisdiction of a county court. If, as here, no application is made for the transfer of the proceedings to the High Court, sub-s. 3 is clear and definite that " the county " court shall have jurisdiction to hear and determine the " whole proceedings, notwithstanding any enactment to the " contrary."

Comyns for the plaintiff. Section 40, sub-s. 1, is not totally prohibitive of counterclaims for slander, but it becomes almost so by reason of the fact that, except in s. 43, there is no general reference in the Act to actions for slander. The words " except

(1) County Courts Act, 1934, s. 40, sub-s. 1: " . . . . Provided " that a county court shall not, " except as in this Act provided, " have jurisdiction to hear and " determine . . . . (*c*) any action for " libel, slander, ..."

By s. 63, sub-s. 1: " Where, in " any action or matter commenced " in a county court, any counter- " claim or set off and counter- " claim of any defendant involves " matter beyond the jurisdiction " of a county court, any party " to the action or matter may, " within such time as may be " prescribed by the rules of the " Supreme Court, apply to the " High Court or a judge thereof " for an order that the whole " proceedings, or the proceedings " on the counterclaim or set off " and counterclaim, be transferred " to the High Court."

By sub-s. 3: " If no application " is made under this section " within the time prescribed as " aforesaid, or if on such applica- " tion it is ordered that the whole " proceedings be heard and de- " termined in the county court, " the county court shall have " jurisdiction to hear and deter- " mine the whole proceedings, " notwithstanding any enactment " to the contrary."

"as in this Act provided" cannot, by themselves, refer to s. 63. As in the present case there is no memorandum of consent s. 43 is not relevant. The words of s. 63, "matter "beyond the jurisdiction of a county court," refer only to the monetary limit of the jurisdiction of the court and not to the subject-matter of the counterclaim. There are express provisions in the Act of 1934 dealing with the subject-matters of paras. (*a*) and (*b*) of sub-s. 1 of s. 40, and, slander having been expressly excluded by para. (*c*), any replacement of it, if intended, would also have been effected by an express provision. [He referred to *Stumore* v. *Campbell & Co.* (1) and *Parsons* v. *Burgess* (2).]

Cur. adv. vult.

April 24. SCOTT L.J. read the judgment of the court in which he stated the facts and continued: The question which we have to decide turns on the interpretation of s. 63 of the County Courts Act, 1934, and, in our opinion, s. 63, sub-s. 3, confers jurisdiction over a counterclaim for slander in unambiguous language.

The intention of the legislature is clear. So far as a plaintiff's claim is concerned, the question of jurisdiction is dealt with in ss. 40 to 62. In s. 63 the Act deals with counterclaims. Here different considerations apply, and different rules are, accordingly, laid down. A counterclaim which "involves "matter beyond the jurisdiction of a county court" may, nevertheless, be heard by the county court in the absence of an application by the plaintiff under the section. It is clear, in our opinion, that a cause of action not normally triable in a county court, such as slander, is a "matter" properly described as being "beyond the jurisdiction of a county court." It was submitted on behalf of the plaintiff that only a counterclaim for a sum of money exceeding the jurisdiction of the court could be so described. This construction of the section does not appeal to us, and a consideration of earlier enactments confirms us in the view that it is erroneous. Section 203 of the Supreme Court of Judicature (Consolidation) Act, 1925, dealt with counterclaims in county courts, and the phrase "matter "beyond the jurisdiction of the court" occurs in the body of the section and in the third proviso. In proviso (2.) (*c*) the legislature deals expressly and in a different manner with

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(1) [1892] 1 Q. B. 314, 316.

(2) (1927) 96 L. J. (K. B.) 787.

C. A.
1944
HARDWICKE
v.
GILROY.

counterclaims "for an amount of money exceeding the "jurisdiction of the court." We find here a clear indication that the phrase "matter beyond the jurisdiction of the court" was used by the legislature in 1925 with reference to counterclaims which were outside the jurisdiction of the court because of their subject-matter and not merely those in which the sum claimed was in excess of that which a plaintiff can recover. In the County Courts (Amendment) Act, 1934, the distinction was removed, and the expression "matter beyond the "jurisdiction of a county court" was used (in s. 11), as it is in the present Act, with reference to both subject-matter and amount.

In our opinion, the learned judge placed too narrow a construction on s. 63. The appeal is allowed, with costs here and below. The order must be set aside and the counterclaim restored.

Appeal allowed.

Solicitors for defendant: *E. C. Kilsby & Son.*
Solicitor for plaintiff: *A. Leslie Smith.*

A. W. G.

REX *v.* TURNER.

C. C. A.
1944
Mar. 20;
April 3.

Viscount Caldecote C.J. Humphreys, Singleton, Tucker and Cassels JJ.

Criminal law—Rape—Defence—Consent—Allegation of indecency by prosecutrix—" Imputations on character"—Criminal Evidence Act, 1898 (61 *&* 62 *Vic., c.* 36), *s.* 1 (*f.*) (*ii.*).

The defence of consent to a charge of rape is nothing more than a denial by the prisoner that the prosecution, on whom lies the onus of proof, have established absence of consent on the part of the prosecutrix, which is one of the ingredients of the charge. It does not, therefore, involve an imputation on the character of the prosecutrix within proviso (*f.*) (ii.) to s. 1 of the Criminal Evidence Act, 1898, so as to put the character of the prisoner in issue.

Ruling of Jelf J. in *Rex.* v. *Sheean* (1908), 21 Cox C. C., 561, approved.

At the trial of the appellant his counsel in cross-examination of the prosecutrix suggested to her that she not merely consented to intercourse, but also offered to commit an act of gross indecency on him, and the appellant in his examination-in-chief gave evidence to the same effect:—

Held, that the appellant did not thereby lose the protection of proviso (*f.*), since the questions in cross-examination and his own evidence were directed to the proof of her consent and did no

C. C. A.

1944

REX
v.
TURNER.

more than state the details or particulars of the conduct of the prosecutrix, which, according to the appellant's version of the facts, showed that the act complained of was not against her will.

APPEAL against conviction.

The appellant, James Turner, was charged before Charles J., at Bedford Assizes with the rape of Ivy Muriel King, a woman who had been married and divorced by her husband. On the evening of October 12, 1943, while she was on a visit to her mother, who lived at Tempsford, she met three or four soldiers of whom the appellant was one. The other soldiers walked on while the appellant remained talking to her. According to her evidence, he caught hold of her, kissed her, tripped her up, hit her in the face when she struggled, tore open the " zip " fastening of the slacks she was wearing so as to tear the material, tore her knickers and succeeded in committing rape on her. She then went straight to her mother's house. Her evidence was amply corroborated by other witnesses. At the trial the defence put forward was that the prosecutrix consented to the act, and counsel for the appellant cross-examined her as follows :—" (Q.) There is " one point that I must put to you, because they are my " instructions. He took out his penis at some stage of the " proceedings ? " (A.) " Yes." (Q.) " You were aware of " that, were not you ? " (A.) " Yes. I did not see him " take it out." (Q.) " You knew he was seeking intercourse " with you ? " (A.) " Naturally, when he was struggling like " that at my clothes." (Q.) " Did you offer to relieve him in " another way ? " (A.) " Not in any shape or form." Then Charles, J., said : " What does that mean, Mr. Davidson ? " Do you suggest that she offered to commit a gross " indecency ? " Mr. Davidson. " It amounts to an offer to " masturbate." The appellant subsequently gave evidence on his own behalf, and in examination-in-chief, this took place : (Q.) " Did she struggle a bit ? " (A.) " Slightly." Charles J. : " Why do you say she struggled ? " (A.) " I don't " know. After putting my hand there I unfastened my " trousers and took out my penis, but she said : ' Don't do " ' it ; I can,' and she put down her hand and took hold of it. " She took hold of my penis and said : ' I will do it.' That " made me worse. Then I went to put my penis to hers and " found it awkward, so I laid her down on the ground near " the wall." (Q.) " You just laid her down ? " (A.) " I just " gently laid her down." (Q.) " You gently what ? "

(A.) " I just bent her backwards and laid her down." Mr. Davidson : " Then what happened ? " (A.) " I asked " her if I could have connexion." (Q.) " You asked her, did " you ? " (A.) " Yes." (Q.) " What did she say ? " (A.) " She said : ' All right, but promise me you will be " ' careful '." The appellant was then cross-examined, and at what appeared to be the close of his cross-examination this took place : Charles J., addressing counsel for the Crown : " There remains now another matter. The jury are asked to " believe that the lady not only asked him to do something " indecent, but that she took his person in her hand, that is to " say, committed an act of gross indecency on him, indecently " assaulted him." " Yes, my Lord. If the cross-examination " had stopped at that point, I should not have objected." Charles J. : " But it did not. I do not think you can leave " it there. The suggestion to the jury was that this woman " is a filthy, nasty woman, utterly filthy, who would commit " an indecent assault on that man. I do not think that can " be done without the consequence of such a suggestion being " incurred " (1). After some further argument, the judge, addressing the jury, explained the ruling which he was about to give, and he said : " In the ordinary way you cannot put " a previous conviction to a man. The jury does not know " anything against his character unless he makes an attack " on the character of the prosecutor, prosecutrix or one of " the witnesses for the prosecution. Here he has done that, " and, accordingly, I rule that counsel for the prosecution is " entitled to put any question as to his character." Counsel for the Crown then asked this question : " This is not the " first time an allegation has been made against you ? " (A.) " No." (Q.) " At the Anglesey Quarter Sessions in June, " 1941, you were convicted of an offence of this kind ? " (A.) " Yes." (Q.) " You were convicted of an assault on

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(1) Criminal Evidence Act, 1898, s. 1, proviso : " (*f*) A person charged and called as a " witness in pursuance of this Act " shall not be asked, and if asked " shall not be required to answer, " any question tending to show " that he has committed or been " convicted of or been charged " with any offence other than that " wherewith he is then charged, or " is of bad character, unless . . . . " (ii.) he has personally or by his " advocate asked questions of the " witnesses for the prosecution " with a view to establish his good " character, or has given evidence " of his good character or the " nature or conduct of the defence " is such as to involve imputations " on the character of the prosecutor or the witnesses for the " prosecution ; . . . ."

"a female with intent to ravish her and sentenced to nine "months imprisonment?" (A.) "Yes." On March 6, when the appeal came on for hearing before Humphreys, Stable and Cassels JJ., that court was invited by counsel for the Crown to give a ruling on a question which had been expressly left open for future consideration in *Rex* v. *Preston* (1) namely, whether, where a person who was charged with rape put forward the defence of consent by the prosecutrix, the nature or conduct of the defence was such as to involve imputations on the character of the prosecutrix within s. 1, proviso (*f*) (ii.), of the Act of 1898, so as to put the character of the prisoner in issue. The hearing was adjourned and the present court of five judges was convened.

John Davidson for appellant. The nature or conduct of the defence, as shown by questions put by me to the prosecutrix in cross-examination and by the evidence-in-chief of the appellant, was not such as to involve imputations on the character of the prosecutrix within para. (ii.) of proviso (*f*) to s. 1 of the Criminal Evidence Act, 1898. Any single question put in cross-examination may, it is conceded, show the nature of the defence to involve imputations on the character of the prosecutrix or that of a witness for the prosecution, but para. (ii.) does not mean that any question or evidence that can be construed as involving an imputation is sufficient to deprive the prisoner of the protection of proviso (*f*) The words of para. (ii.) are not words of precision. They are general in their nature and leave the decision to the trial judge. Even if the judge is of opinion that a particular question might be said to cast an imputation on the character of the prosecutrix, he is not bound to permit the prisoner to be cross-examined as to character. In some cases, indeed, he may not do so. To hold otherwise would render sterile the section, which enables an accused person to give evidence in his own behalf. A mere plea of "Not Guilty" in a case of rape undoubtedly involves an imputation on the character of witnesses for the prosecution, save in so far as they may be mistaken, yet, if the words of proviso (*f*) (ii.) are to be construed strictly, a plea of "Not Guilty" is part of the conduct of the defence. It is a cardinal principle of justice that an accused person must not be prejudiced in putting forward or developing his defence where the facts which he alleges can or do involve

(1) [1909] 1 K. B. 568.

an imputation on the prosecutrix or her witnesses, so long as those facts are relevant to the case, or, in other words, are part of the res gestæ. The courts will seldom allow anything to interfere with the rights of a prisoner : see *Rex* v. *Carmichael* (1). The statute itself shows the anxiety of the legislature to secure that everything relevant to the issue shall be before the court. The issue of consent or non-consent is directly raised by the prosecution in a charge of rape and it is for the prosecution to prove that the offence was committed. The defence of consent is merely an allegation that the prosecution have not proved an essential ingredient of the charge : see *Rex* v. *Sheean* (2). [*Rex* v. *Rouse* (3), *Rex* v. *Preston* (4). *Rex* v. *Bridgewater* (5), *Rex* v. *Dunkley* (6), *Reg.* v. *Marshall* (7), *Rex* v. *Hudson* (8), *Rex* v. *Eidinow* (9), *Maxwell* v. *Director of Public Prosecutions* (10), *Rex* v. *Biggin* (11), and *Rex* v. *Donovan* (12) were also referred to.]

Fitzwalter Butler for the Crown. Though it may be conceded that there is a strong argument for the proposition that the defence of consent simpliciter does not amount to such an imputation on the character of the prosecutrix as to render the prisoner liable to cross-examination as to previous convictions, in the present case the conduct of the defence went much further than merely alleging consent. It was on the ground of the conduct of the defence that the learned trial judge held that the appellant's character had been put in issue. A good deal of misapprehension exists as to the proper construction to be put on the proviso to s. 1 of the Act of 1898. Endeavours have been made to read into it words which are not there, but the position was made clear, once for all, by the following passage at the end of the judgment in *Rex* v. *Hudson* (8) : "The words of the section "'unless the nature or conduct of the defence is such as to "'involve imputations on the character of the prosecutor or "'the witnesses for the prosecution' must receive their "ordinary and natural interpretation." That judgment has never been overruled, and was expressly not dissented from

(1) [1940] 1 K. B. 630.
(2) (1908) 21 Cox C. C. 561.
(3) [1904] 1 K. B. 184.
(4) [1909] 1 K. B. 568, 574.
(5) [1905] 2 K. B. 131.
(6) [1927] 1 K. B. 323, 328.
(7) (1899) 63 J. P. 36.
(8) [1912] 2 K. B. 464, 468.
(9) (1932) 23 Cr. App. R. 145.
(10) [1935] A. C. 309, 318, 319.
(11) [1920] 1 K. B. 213, 217.
(12) (1934) 25 Cr. App. R. 1, 3.

in *Rex* v. *Biggin* (1). The proper construction must, therefore, be arrived at by taking the words simply as they are, and it is not a proper criterion to ask whether the imputation is one which was necessary for the development of the defence. The court has simply to ask itself: "Did the nature or "conduct of the defence involve an imputation on the "character of the prosecutrix or the witnesses for the "prosecution." Although there is no precise definition of "character" in the section it would appear to have a more limited meaning than "reputation." Even if this court find that the trial judge was wrong in law in allowing the cross-examination of the appellant as to character, the evidence against the appellant was so overwhelming that no jury could reasonably have acquitted him. The proviso to s. 4 of the Criminal Appeal Act, 1907, should, therefore, be applied, and the appeal dismissed, on the ground that no substantial miscarriage of justice has occurred. [*Rex* v. *Pollinger* (2), *Rex* v. *Jones* (3), *Rex* v. *Roberts* (4), *Rex* v. *Wilson* (5), *Rex* v. *Rappolt* (6), *Rex* v. *McLean* (7), and *Rex* v. *Haddy* (8) were also cited.]

The court allowed the appeal and quashed the conviction, but reserved the pronouncement of the reasons for their decision.

April 3. HUMPHREYS J., read the judgment of the court in which he stated the facts and continued: It appears to us that two questions arise, the first being whether, where a person charged with rape puts forward the defence that the prosecutrix consented to the act, "the nature or conduct of "the defence is such as to involve imputations on the "character" of the prosecutrix and, in the event of that question being answered in the negative, the further question: "Did the appellant go beyond his allegation of consent by "the prosecutrix and make imputations on her character, so "as to render his cross-examination to character admissible "by virtue of the subsection?"

On the first question, it must be conceded that to allege of a woman that she permitted a man other than her husband to have intercourse with her would be regarded by most persons as an imputation on her character. In the same way, in former times, one of the deadliest insults which could be offered to a gentleman was to call him a liar, and such conduct has often led to a duel, with fatal results, but if an accused person refers to a witness for the prosecution as a liar it does not follow that he is making an imputation on his character so as to render himself liable to cross-examination to character: see *Rex* v. *Rouse* (1). We think that wider considerations are involved in the solution of this problem. On a charge of rape the Crown has to prove two things:—(1.) intercourse, and (2.) the non-consent of the woman. For centuries the law has jealously guarded the right of an accused person to put forward at his trial any defence open to him on the indictment without running the risk of his character, if a bad one, being disclosed to the jury. It would be strange, indeed, if the Act of Parliament which allowed him, in most cases for the first time, to give evidence on oath had virtually deprived him of that right in the case of one serious felony, by enacting that he could only do so at the risk of having his character exposed. What is commonly referred to as the defence of consent in rape is, in truth, nothing more than a denial by the accused that the prosecution has established one of the two essential ingredients of the charge. It is, and must be, the prosecution which introduces the question of consent or non-consent. Can the legislature have intended to penalize the accused who avails himself of the right to give evidence conferred by statute by enacting that he may be cross-examined as to previous convictions if he denies one, though not if he only denies the other, of the two ingredients of the crime. In our opinion, this is one of the cases where the court is justified in holding that some limitation must be put on the words of the section, since to decide otherwise would be to do grave injustice never intended by Parliament. In *Rex* v. *Sheean* (2), the question came before Jelf J. at the Stafford Assizes in March, 1908. That learned judge held that where a prisoner, to clear himself on a charge to which consent is a good defence in law, alleges that the prosecutrix did so consent, that allegation does not expose him to cross-examination as to previous convictions by reason of s. 1, proviso (*f*) (ii.) of the Criminal Evidence Act, and he declined to follow a ruling to the contrary by Day J., in *Reg*. v. *Fisker* (3). We agree with

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(1) [1920] 1 K. B. 213.
(2) (1930) 22 Cr. App. R. 75.
(3) (1923) 17 Cr. App. R. 117.
(4) (1920) 15 Cr. App. R. 65.
(5) (1924) 18 Cr. App. R. 108.
(6) (1911) 6 Cr. App. R. 156.
(7) (1926) 19 Cr. App. R. 104.
(8) Ante p. 442.

(1) [1904] 1 K. B. 184.

(2) (1908) 21 Cox C. C. 561.

(3) *The Times* Jan. 31, 1899: 34 L. J. News, 100.

that ruling of Jelf J., and accordingly answer the first question in the negative. In so holding we are satisfied that we are following the uniform practice of the last thirty-five years. We know of no authority in which doubt has been cast on the correctness of the decision of Jelf J. On the other hand, in *Rex* v. *Biggin* (1), in which the judgment of the court turned upon another point, Avory J., in the course of the argument is reported as observing: "In a prosecution for rape the "prisoner cannot be cross-examined as to his antecedents "and character merely because questions have been put to "the woman alleging that she consented," and again in *Rex* v. *Donovan* (2), Lord Hewart C.J., observed during the argument: "I thought it had been held over and over again that putting "forward a defence of consent does not amount to making "an imputation on the character of the prosecutrix. That is "the accepted view of the law, though there is a decision "to the contrary in *Reg.* v. *Fisher*" (3). Finally, it would seem that Charles J., in the present case would not have permitted the cross-examination of the appellant as to his previous conviction but for the introduction of the incident referred to in the cross-examination of the prosecutrix.

Turning to the second point, there can be no doubt that an accused person, the nature of whose defence does not of itself involve imputation on anyone, may yet, in the conduct of that defence, make imputations which will bring him within the terms of proviso (*f*) (ii.). Where, however, as in the present case, the suggested further imputation is on the character of the woman whose consent would afford a defence to the charge, the accused does not lose the protection of the opening words of proviso (*f*) so long as his questions and evidence are directed to the proof of that consent. It may not always be easy to decide whether the new topic is so closely connected with the defence of consent as in effect to form part of it. For that reason we agree with the observation to be found in various judgments of this court that the proper course for counsel for the Crown is that followed by Mr. Butler in the present case, namely, to obtain the ruling of the court before embarking on such a cross-examination. The presiding judge, recorder or chairman of quarter sessions will, no doubt, remember that any matter of doubt is to be resolved in favour of the accused. If the jury are inclined to believe the woman,

(1) [1920] 1 K. B. 213, 217.
(2) (1934) 25 Cr. App. R. 3.
(3) *The Times*, Jan. 31, 1899; 34 L. J. News, 100.

C. C. A.

1944

Rex
v.
Turner.

they are not likely to be swayed by one more allegation against her made by the accused, whereas the effect of the proof of a previous conviction for a similar offence may, and in most cases probably will, be fatal to any chance of an acquittal. In the present case, we cannot find that the evidence given by the appellant, which caused the learned judge to allow the cross-examination to character, went one step beyond the defence of consent. That evidence, in our view, did no more than state the details or particulars of the woman's conduct which, according to the witness's version of the facts, showed that the act of connexion was not against her will or without her consent.

On the whole we have come to the conclusion that the conviction cannot stand. We were invited by counsel for the Crown to apply the proviso to s. 4 of the Criminal Appeal Act, 1907, on the ground that no miscarriage of justice has actually occurred. The case against the appellant certainly appears to have been a very strong one, but this is a case of a wrong decision on a question of law, as to the effect of which see the considered judgment of this court in *Rex.* v. *Cohen & Bateman* (1). Indeed, we are not aware of any precedent for applying the proviso in a case where cross-examination to character has been deliberately admitted by the trial judge. We have not had the advantage of seeing and hearing the witnesses, and we feel that, without the evidence which was, in our opinion, wrongly admitted, the whole trial and the summing-up would have been of so different a character that we could not, without substituting ourselves for the jury, hold that the only reasonable verdict would have been one of guilty.

Conviction quashed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitors for the Crown: *Lathom & Co., Luton.*

(1) (1909) 2 Cr. App. R. 197, 207.

A. W. G.

C. A.

1944
April 3.

Scott and
du Parcq L.JJ.

W. HILL & SON *v.* TANNERHILL.

Practice—Parties—Individual without partners trading in firm name—Issue of writ in firm name—Substitution of individual's name—R. S. C., Or. 48A, *r.* 1.

W. Hill, an individual trading alone and without partners as "W. Hill & Son," issued a writ in the firm name contrary to R. S. C., Or. 48A, r. 1. The period of time prescribed by the Limitation Act, 1939, within which the action must be brought having expired, W. Hill applied for an order substituting as plaintiff in the action "W. Hill trading as W. Hill & Son":—

Held, that, as W. Hill was an actually existing person and the real plaintiff in the action, he was entitled to the order.

Noble Lowndes & Partners v. *Hadfields, Ld.* (*A firm*) [1939] Ch. 569, followed.

Mabro v. *Eagle Star & British Dominions Insurance Co.* [1932] 1 K. B. 485, distinguished.

Appeal from Stable J., in chambers.

Walter Hill carried on business alone and without partners under the name of "W. Hill & Son." On April 24, 1942, his motor car was damaged by the negligence, as he alleged, of the driver of an army lorry. On April 21, 1943, on his instructions a writ was issued in which damages in respect of the accident were claimed from the driver of the lorry. By the inadvertence of a solicitor's clerk "W. Hill & Son" were stated in the writ to be the plaintiffs in the action, whereas R. S. C., Or. 48A, r. 1, provides that a writ in a firm name can only be issued by two or more persons carrying on business as the firm. On April 24, 1943, the period of one year within which, by s. 21, sub-s. 1, of the Limitation Act, 1939, an action must be brought against a person for neglect in the performance of a public duty expired. On November 29, 1943, Walter Hill took out a summons in which he asked for an order substituting as plaintiff in the action "Walter Hill "trading as W. Hill & Son." The master made the order asked for, and, on appeal, it was affirmed by Stable J. The defendant appealed.

Lynskey K.C. and *Ryder Richardson* for the defendant. The court will not substitute one plaintiff for another when the result would be to deprive the defendant of an accrued statutory defence: *Mabro* v. *Eagle Star, &c., Insurance Co.* (1).

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(1) [1932] 1 K. B. 485.

The plaintiff could not sue in the firm name: *Mason* v. *Mogridge* (1); and, therefore, on November 29, 1943, his writ should have been treated as a nullity. Instead, it was considered by the master, and, by creating a new liability his order and that of the judge will defeat the statutory defence which had accrued to the defendant under the Limitation Act, 1939. *Noble Lowndes & Partners* (*A firm*) v. *Hadfields, Ld.* (2) would appear to be somewhat against the defendant's contention, but in that case all that was done was to strike out the names of plaintiffs so as to leave that of the real plaintiff. Here the facts are totally different. [*Tetlow* v. *Orela, Ld.* (3) was also referred to.]

Eddy K.C. and *Horace Fenton* for the plaintiff were not called on to argue.

Scott L.J. [after stating the facts]: Walter Hill had no right to issue a writ in the name of " W. Hill & Son," as if he was issuing a writ in the name of himself and a son whose name he did not give, when, in fact, he had no partner, but traded by himself, for Or. 48A, r. 1, does not allow that to be done. A person carrying on business in a firm name by himself may be sued under Or. 48A, r. 11, in that name, but that has nothing to do with this case. Mr. Lynskey, for the defendant, has submitted that, having regard to the rules, the writ as issued in the name of W. Hill & Son ought to have been treated as a nullity and as not disclosing any cause of action because the real plaintiff was not described. At first sight that seemed a good basis for invoking the principle that an amendment in an action will not be allowed after the defendant has become entitled, under any statute of limitations, to a statutory defence to the claim. Mr. Lynskey relied on the well-known decision of this court in *Mabro* v. *Eagle Star, &c., Insurance Co., Ld.* (4), of which the headnote is: " The court will not, under Or. 16, " r. 2, allow a person to be added as plaintiff to an action " if thereby the defence of the Statute of Limitations would be " defeated." Scrutton L.J. said: " The application now " before us is that a person named Zok should be added " as plaintiff, as being the administrator of his father, who died " in March, 1927, that is, two years after the action had " been commenced by the Mabros, and who, it is said,

(1) (1892) 8 T. L. R. 805.
(2) [1939] Ch. 569.
(3) [1920] 2 Ch. 24.
(4) [1932] 1 K. B. 485, 487.

C. A.

1944

W. Hill & Son v. Tannerhill.

Scott L.J.

" was the person interested in the insurance." After referring to Or. 16, r. 2, the lord justice goes on: " In my experience " the court has always refused to allow a party or a cause of " action to be added where, if it were allowed, the defence " of the Statute of Limitations would be defeated. The court " has never treated it as just to deprive a defendant of a legal " defence." That is a very well-known principle, but it depends on the fact that the amendment turns an action which has become ineffective by reason of the passage of time into an effective action again by the addition of a new plaintiff after the date when the limitation period has elapsed.

Is the present that kind of case? In my view, it is more akin to *Noble Lowndes & Partners* (*A firm*) v. *Hadfields, Ld.* (1). The headnote of that case is: " A contract was entered into " by N. F. L. on behalf, as he thought, of a firm, N. L. and " Partners. An action for breach of the contract was brought " in the name of N. L. and Partners against the defendants. " On discovery it was found that there was no firm of that " name. N. F. L. sought to amend the statement of claim " by substituting his name only as plaintiff and " the defendants sought to strike out the statement of " claim:—*Held*, that there was a bona fide mistake, and " that, where two or more persons claiming to be partners " sue or are sued in a firm name under Or. 48A, the action " remains an action by or against the individual members " of the firm, and the application therefore amounted to an " application to strike out the names of all the plaintiffs except " one, and should be allowed." I refer particularly to the passage in Farwell J.'s judgment (2), where he says: " Order 48A enables persons carrying on business in partnership " to sue or be sued in the firm name, but that is a rule made " for convenience, and an action by or against a firm " notwithstanding the rule remains an action by or against " the individual members of the firm." In that case Farwell J. gave leave to make an amendment, but it did not involve bringing in a new party with a new cause of action in respect of a matter that had already become statute barred. Here, I think, the position is analogous. When the writ was issued in the name of " W. Hill & Son " there was an individual person in fact interested in the claim. His description as " W. Hill & Son " was a mistake by a clerk. The question is whether that mistake is more than a mistake in form.

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(1) [1939] Ch. 569.

(2) Ibid. 572.

In my opinion, it is not. Under Or. 48A, r. 1, one person, even if he is carrying on business in a firm name, cannot issue a writ in the firm name, but if a real person does issue the writ in his own name, say, of " W. Hill," the fact that he adds the two additional words " and Son " does not prevent his still being the real plaintiff in the action.

The application under the order for directions that his name should be written in full as " Walter Hill " instead of " W. Hill " obviously by itself would have been unobjectionable. The addition asked for, " trading as W. Hill " and Son," as if he were a firm, is mere useless and inappropriate surplusage, but it does not prevent the fact that it was Walter Hill himself who was still going to be the plaintiff just as he had originally in the writ been the plaintiff. For these reasons I think the master and the judge were right in allowing the amendment. The appeal must be dismissed, with costs.

DU PARCQ L.J. I agree. The defendants were undoubtedly entitled to take this point, but I am bound to say that I should have thought it very regrettable if we had had to decide that they were right. I do not think that any ordinary person to whom the facts were stated would have thought that justice was being done.

It is clear that a single person trading under a firm name is not entitled to issue a writ in a firm name, but it is wrong to say that when this writ was issued in the name of " W. Hill & " Son," it was issued in the name of a non-existent person. That, as I ventured to suggest, was the fallacy of Mr. Lynskey's argument. The same fallacy was pointed out by Farwell J. in *Noble Lowndes & Partners* (*A firm*) v. *Hadfields, Ld.* (1) to which we have been referred. If the writ had been issued in the name of " W. Hill & Son, Ld.," the case would have been very different, because " W. Hill & Son, Ld." indicates a legal entity and a person. I do not say what we should have done or what the learned judge would have been in a position to do if there had been no " W. Hill " of the address given and the owner of the lorry had been someone of a different name trading in the name of " W. Hill & Son." A question may arise about that some day, but in this case there is a " W. Hill," and all that need be said is that " and Son " ought not to have been added.

(1) [1939] Ch. 569, 572.

C. A.
1944
W. HILL & SON v. TANNERHILL.
du Parcq L.J.

We are not departing in the least from the principle laid down in *Mabro* v. *Eagle Star, &c., Insurance Co.* (1). If a man issues a writ out of time he will be defeated by the Limitation Act. Suppose a man comes to the court and says: "I ought "to be a plaintiff, but I am not. Someone else issued the "writ in time. I want you to leave him out and put me in "instead of him." It is obvious that, by acceding to that request, the court would, in effect, be allowing the new plaintiff to begin an action when he was out of time, and it hardly needs any argument to support the rule which was cogently stated by Scrutton L.J. in *Mabro's* case (1), but the present as my lord has said, is an entirely different case, and I do not wish to add anything further to what he has said and to what was so well expressed by Farwell J. in *Noble Lowndes & Partners (A firm)* v. *Hadfields, Ld.* (2). I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for defendant: *L. Bingham & Co.*
Solicitors for plaintiff: *Thompson & Co.*

(1) [1932] 1 K. B. 487. (2) (1939) Ch. 569.

W. L. L. B.

C. A.
1944
Mar. 14, 15, 27.
Scott Goddard and du Parcq L.JJ.

BOWATER *v.* ROWLEY REGIS CORPORATION.

Negligence—Master and servant—Volenti non fit injuria—Carter employed to collect road sweepings—Ordered to drive unsafe horse.

The plaintiff, a carter employed to collect road sweepings by a municipal corporation, was ordered by his foreman to take out a horse which, to the knowledge of both of them, had run away on at least two previous occasions when driven by a fellow employee. The carter protested, but the foreman said that it was an order of the borough surveyor. Some weeks later, the horse ran away and the plaintiff was thrown from his cart and suffered personal injuries. In an action against the corporation by the plaintiff, alleging that they had failed in their duty to provide him with a horse which was safe and suitable for the work which he had to perform:—

Held, that the corporation were negligent, and that the plea of volenti non fit injuria was inapplicable.

Per Goddard L.J. In a case of master and servant the maxim "volenti non fit injuria" must be applied with extreme caution. It can hardly ever be applicable where the act to which the servant is said to be "volens" arises out of his ordinary duty unless the work for which the servant is engaged is one in which danger is necessarily involved, as in the case of a man employed in an explosives factory or as a horse-breaker. A man whose occupation is not of a nature inherently dangerous, but who is asked to undertake a risky operation, is in a different position. To rely on the doctrine, the master must show that the servant undertook that the risk should be on him and was a volunteer in the fullest sense. It is not enough that, whether under protest or not, he obeyed an order which he might have declined to obey. It need not necessarily be shown that the servant contracted to take the risk, as that would involve consideration, though a simple way of showing that a servant did take a risk on himself would be that he was paid extra for doing so.

Yarmouth v. *France* (1887) 19 Q. B. D. 647; *Smith* v. *Baker* [1891] A. C. 325 and *Monaghan* v. *Rhodes & Sons* [1920] 1 K. B. 487, applied.

APPEAL from Singleton J., at Birmingham Assizes.

The plaintiff was employed by the defendant corporation as a carter to drive a cart in the wake of road sweepers and collect the sweepings. A fellow-servant of the plaintiff, named Payne, had driven a horse belonging to the defendants which had run away on at least two occasions. Thereafter Payne refused to take out the horse. The defendants' foreman knew of these incidents, as did the plaintiff. When ordered to take the horse out, the plaintiff protested, but the foreman said that the borough surveyor had said that he was to take the horse to the park. For about a month the plaintiff had no great difficulty with the horse, though after the first day he reported to the foreman that he had found him " a little bad at times— " jumpy." Later, however, on a day when the plaintiff was accompanied by a mate with only one arm, the horse, at the sight of some boys playing cricket, ran away. The plaintiff was thrown out of the cart and suffered personal injuries. He brought an action against the defendants, alleging that they had failed in their duty to provide him with a horse which was safe and suitable for the work he had to perform. The defendants denied the breach of duty and pleaded contributory negligence and " volenti non fit injuria." At the trial, Singleton J., in his judgment, said that the question of negligence had not really been argued. The defendants called no evidence, and he did not decide the case on that ground. He held, however, that the plea of " volenti non fit " injuria " was made out and he gave judgment for the defendants. The plaintiff appealed.

C. A.

1944

BOWATER v. ROWLEY REGIS CORP.

Morris K.C. and *Fox-Andrews* for plaintiff. The maxim, "volenti non fit injuria," is based on agreement: *Smith* v. *Baker* (1). If a servant contracts to serve in a dangerous employment such as that of a horse-breaker or a house-breaker, no doubt, he contracts to take the ordinary risks of that employment. Where, however, a servant who is in employment not inherently dangerous, is ordered or asked to take on himself an additional risk, and he is injured thereby, the master can only support the plea of "volenti non fit injuria" if he establishes that there was a new contract for good consideration that the servant should take that risk on himself: *Yarmouth* v. *France* (2); *Smith* v. *Baker* (1); *Monaghan* v. *Rhodes* (3). There is an obligation at common law on a master to provide proper plant for his servants' employment: *Wilsons & Clyde Coal Co., Ld.* v. *English* (4). A horse which a carter drives is such plant: *Yarmouth* v. *France* (2). Both the foreman who ordered the plaintiff to take out the horse and the plaintiff knew of the propensity of the horse to bolt and there could have been a contract between the plaintiff and the defendants for good consideration, such as danger money, to take out the horse. It lies on the defendants strictly to prove such a contract if they would avail themselves of the maxim, and they have not done so. In any case, the plaintiff was not "volens" and he did not voluntarily undertake the risk of injury: *Smith* v. *Baker* (1) [*Thomas* v. *Quartermaine* (5); *Baddeley* v. *Earl Granville* (6); *Membery* v. *Great Western Railway Co.* (7); *Baker* v. *James Brothers & Sons, Ld.* (8); *Letang* v. *Ottawa Electric Railway Co.* (9); *Cutler* v. *United Dairies (London), Ld.* (10); *Wheeler* v. *New Merton Board Mills, Ld.* (11); *Haynes* v. *Harwood* (12); *Gillmore* v. *London County Council* (13); *Dann* v. *Hamilton* (14); and *D'Urso* v. *Sanson* (15) were also referred to.]

Edgedale and *W. B. Franklin* for the defendants. It is conceded that the defence of "volenti non fit injuria" must depend on agreement, express or implied, but there was here

(1) [1891] A. C. 325.
(2) (1887) 19 Q. B. D. 647.
(3) [1920] 1 K. B. 487.
(4) [1938] A. C. 57.
(5) (1887) 18 Q. B. D. 685.
(6) (1887) 19 Q. B. D. 423.
(7) (1889) 14 A. C. 179.
(8) [1921] 2 K. B. 674.
(9) [1926] A. C. 725.
(10) [1933] 2 K. B. 297.
(11) [1933] 2 K. B. 669.
(12) [1935] 1 K. B. 146.
(13) (1938) 159 L. T. 615.
(14) [1939] 1 All E. R. 59.
(15) [1939] 4 All E. R. 26.

an agreement that the plaintiff would take on himself the additional risk, the consideration being that the defendants refrained from giving him notice. Singleton J. was right in inferring that the plaintiff had accepted the additional risk. There was no negligence here on the part of the defendants.

Cur. adv. vult.

March 27. The following judgments were read.

SCOTT L.J.: I have read the judgments of my brethren and agree with their conclusions and with the reasoning by which they reach them. I would add, however, that not only would it have been wrong for us to allow the defendants now to rely on the pleaded defence of no negligence when they had abandoned it at the trial, but also, as my brother du Parcq says, the facts of the case preclude the possibility of that defence succeeding, for there was clearly prima facie evidence of negligence on the part of the defendants, and their counsel elected to call no witnesses.

With regard to the doctine "volenti non fit injuria" I would add one reflection of a general kind. That general maxim has to be applied with specially careful regard to the varying facts of human affairs and human nature in any particular case just because it is concerned with the intangible factors of mind and will. For the purpose of the rule, if it be a rule, a man cannot be said to be truly "willing" unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will. Without purporting to lay down any rule of universal application, I venture to doubt whether the maxim can very often apply in circumstances of an injury to a servant by the negligence of his master. When the servant is engaged specifically for the performance of a dangerous duty and the presence of the danger is a mutually recognized element in the bargain for remuneration, the servant obviously undertakes the risk for the sake of higher pay. A good illustration is the task of the house-breaker. We have all of us watched its performance during the war on bomb-shattered buildings in the course of demolition and marvelled at its dangers. The task of a horse-breaker is

C. A.

1944

BOWATER v. ROWLEY REGIS CORP.

Scott L.J.

similar, but in contracts of employment where the service is hazardous and for that reason highly paid it is not easy to imagine a circumstance in which the hazard causing the hurt to the servant is also attributable to the negligence of the master, and, unless it is, the servant who is injured suffers no " injuria " in the legal sense of an actionable wrong, which is the condition of the maxim. I agree with the order proposed by my brother Goddard.

GODDARD L.J.: In the action out of which this appeal arises, the plaintiff founded his case entirely on the allegation that the defendants failed in their duty to provide him with a horse safe and suitable for the work which he had to perform. On the appeal Mr. Edgedale, who did not appear in the case below, sought to uphold the judgment on the ground that no negligence was proved. He appealed to the court's knowledge of the disposition of four-year-olds, saying that horses of that age were the equivalent of boys of twelve, though he did not add that at that age boys are often mischievous young rascals, but judges have no judicial knowledge of the habits of horses, not even if they have been stewards of the Pegasus Club. Had they desired to dispute negligence and to say that this was just the sort of animal one would expect to find between the shafts of a municipal dust cart, the defendants could have called witnesses. They did not do so, and it would be quite wrong to allow them in this court to rely on a defence, which, though pleaded, was not persisted in at the trial and is quite inconsistent with the case on which they relied. Their whole case was " volenti non fit injuria," one which Mr. Edgedale frankly admitted he felt was difficult to support after Mr. Morris' elaborate review of the authorities in the course of his argument. It is only fair to the learned judge to say that many of the cases cited to us were not before him. Indeed, I gather from his judgment that, had he not pressed for some citation of authority and had not an adjournment fortunately intervened, none would have been cited, counsel on either side feeling, I suppose, that the facts were so clear in his favour that authority was superfluous.

The maxim "volenti non fit injuria" is one which in the case of master and servant is to be applied with extreme caution. Indeed, I would say that it can hardly ever be applicable where the act to which the servant is said to be " volens " arises out of his ordinary duty, unless the work for which he is engaged is one in which danger is necessarily involved. Thus, a man in an explosives factory must take the risk of an explosion occurring in spite of the observance and provision of all statutory regulations and safeguards. A horse-breaker must take the risk of being thrown or injured by a restive or unbroken horse. It is an ordinary risk of his employment. A man, however, whose occupation is not one of a nature inherently dangerous but who is asked or required to undertake a risky operation is in a different position. To rely on this doctrine the master must show that the servant undertook that the risk should be on him. It is not enough that, whether under protest or not, he obeyed an order or complied with a request which he might have declined as one which he was not bound either to obey or to comply with. It must be shown that he agreed that what risk there was should lie on him. I do not mean that it must necessarily be shown that he contracted to take the risk, as that would involve consideration, though a simple way of showing that a servant did undertake a risk on himself would be that he was paid extra for so doing, and in some occupations "danger "money" is often paid.

This, in my opinion, is the result of *Yarmouth* v. *France* (1); *Smith* v. *Baker* (2), and *Monaghan* v. *Rhodes* (3), and further citation of authority in support of what I think is now a well-settled principle is unnecessary. Though the question in the last resort is one of fact I find myself unable to agree with Singleton J. on the evidence in this case. I venture to think he approached the case from a wrong angle. A corporation carter or dustman is not like a horse-breaker because he is also a horse-keeper. It is no part of his duty to break or tame the horse which draws the dust cart. Nor is it right to inquire into the mental processes that may lead him to do what he is told or to consider what degree of appreciation of the risk was apparent to him. As Lord Esher M.R. said in *Yarmouth* v. *France* (4), that would be to say that, for the same accident, an unintelligent man might recover, while a more intelligent one would not. For this maxim or doctrine to apply it must be shown that a servant who is asked or required to use dangerous plant is a volunteer in the fullest sense, that, knowing of the danger, he expressly or impliedly said that he would do the job at his own risk and not at that of his master.

(1) 19 Q. B. D. 647.
(2)]1891] A. C. 325.
(3) [1920] 1 K. B. 487.
(4) 19 Q. B. D. 657.

The evidence in this case fell far short of that, and, in my opinion, the plaintiff was entitled to recover. The appeal is allowed, with costs, and the case must go down for a new trial on damages only unless the parties will agree to this court assessing the damages.

DU PARCQ L.J. (after stating the facts): It was contended by the defendants' counsel at the trial that the plaintiff had willingly assumed whatever risk was associated with the task allotted to him. I so translate the Latin in which the learned pleader had preferred to clothe his plea—Volenti non fit injuria. The learned judge thought that the plea was made out. His interpretation of the facts was that the plaintiff had not, as was submitted on his behalf, consented under protest, but that he had merely grumbled before entering upon work " which " after all," said the learned judge, " was his work as an " experienced horseman to do." By this I understand Singleton J. to mean that it was implicit in the plaintiff's contract of employment that he should be prepared to deal with such recalcitrant horses as the one with which we are here concerned. With great respect to the learned judge, I cannot persuade myself that the evidence justifies this view. The words " experienced horseman " are perhaps ambiguous. It is true that for about twelve years the plaintiff had driven horses for the corporation, and in that sense he may perhaps be called an " experienced horseman." There is no evidence, however, that the horses usually selected to draw refuse carts upon the highways or in the pleasances of Rowley Regis were mettlesome or intractable animals, or that it was a term, express or implied, of the plaintiff's engagement that he should be prepared to train or break young and unruly horses. The inference which I draw from the evidence is that the horse in question possesses qualities which, be they good or bad, made him a striking exception to the common run of cart-horses with which a carter to the Mayor, Aldermen and Burgesses of Rowley Regis would become familiar. At the trial the learned counsel for the defendants suggested, no doubt on instructions, that the corporation employees thought the horse a devil, and he may well have been right. No evidence was called on behalf of the defendants, so that we do not know in what language the surveyor and foreman would have expressed their opinion of the horse.

As I differ from the learned judge's view that the plaintiff

C. A.

1944

BOWATER v. ROWLEY REGIS CORP.

du Parcq L.J.

was only being called on to do what he had already contracted to do, it will be necessary to consider whether there is any other ground on which it can properly be said that he willingly assumed whatever risk there was, although it must be added that Mr. Edgedale did not suggest that any such ground existed. He sought to support the decision of the learned judge by contending that no negligence on the part of the defendants had been proved, and it will be convenient to deal at once with that contention. Now the case was so conducted by the learned counsel for the defendants at the trial (who was not, of course, Mr. Edgedale), that the question of negligence, as the judge says in his judgment, was "not really argued." In the circumstances we should be doing an injustice to the plaintiff if we allowed the defendants to seek a decision in their favour in this court on a point which they withdrew from the area of controversy at the trial. I will add, however, that, on the undisputed evidence, I am satisfied that the defendants were negligent in ordering the plaintiff to drive this horse, or (to state the facts in another way) in providing the plaintiff with a horse which was dangerously unfitted for the particular task which was to be performed. Having regard to all that the evidence tells us of the plaintiff on the one hand, and of the horse on the other, I am satisfied that an employer acting with reasonable care would not have ordered this reluctant servant to take charge of the horse, which he avowed himself to be incapable of controlling. Mr. Edgedale was concerned to defend the character of the horse against any imputation of vice or ferocity. I am prepared to believe that the animal possesses all the nobility of character which is the proper attribute of his species. But the noblest of animals may be ill-fitted for a life of inactivity and humdrum tasks. So it may have been with this one, whether or not his vagaries are to be ascribed (as Mr. Edgedale suggested that they should be) to the inexperience and impetuosity of youth. I am therefore of opinion that the plaintiff's injuries were due to the defendants' negligence, and I cannot agree with the learned judge's view that the plaintiff was encountering only the kind of risk which he had accepted as part of his regular employment. Little more need be said about the plea of "volenti non fit "injuria." In my opinion, there is nothing in the facts of this case to show that the plaintiff was "volens" according to the true meaning of the maxim as it has been interpreted in decisions which are binding on us. I will content myself with

C. A.
1944
Bowater v. Rowley Regis Corp.
du Parcq L.J.

the citation of one passage from the speech of Lord Herschell in *Smith* v. *Baker* (1), which, in my judgment, may properly be applied to the facts of this case: "Where a servant has been "subjected to risk owing to a breach of duty on the part of his "employer, the mere fact that he continues his work, even "though he knows of the risk and does not remonstrate, does "not preclude his recovering in respect of the breach of duty, "by reason of the doctrine 'volenti non fit injuria,' which in "my opinion has no application to such a case." The fact that in this case the plaintiff did remonstrate makes his case so much the stronger.

For these reasons I agree that the appeal should be allowed and I concur in the order proposed by Goddard L.J.

Appeal allowed.

Solicitor for plaintiff: *W. H. Thompson.*
Solicitor for defendant: *W. C. Crocker.*

C. G. M.

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(1) [1891] A. C. 325, 365.

C. A.
1944
April 3, 4, 24
Lord Greene M.R.
Goddard L.J.
Hallett J.

LOVE *v.* NORMAN WRIGHT (BUILDERS), LIMITED.

Sale of goods—Purchase tax—Liability of seller to account for tax—Contract silent as to recoupment by buyer—Liability of buyer—Finance (No. 2) Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 48), *s.* 27.

Under a contract, entered into after the Finance (No. 2) Act, 1940, has come into force, for the sale of goods chargeable to purchase tax under that Act the buyer is under no liability to pay the registered seller the purchase tax in addition to the agreed purchase price unless the contract so provides. The registered seller is accountable for the tax under s. 22 of the Act, and s. 27 cannot be construed as imposing on the buyer the obligation to recoup him.

Paprika Ld. v. *Board of Trade*, ante, p. 327, approved.

Appeal from Croom-Johnson J.

On November 10, 1942, the defendants, Norman Wright (Builders), Ld., contracted with the Secretary of State for War to do the work and supply the material mentioned in schedules to the contract, including the supply of black-out curtains, curtain rails and battens and their erection at a number of police stations, at 16½ per cent. below the prices set out in sch. J. On December 18, 1942, the defendants sub-contracted with the plaintiff, who was a manufacturer registered under s. 23 of the Finance (No. 2) Act, 1940, for the supply, delivery and fixing of black-out curtains, rails and battens as required by the main contract " at sch. J rates less 27½ per " cent., less 2½ per cent., prompt cash." The plaintiff carried out the work and sent the defendants a bill of which part only was paid. On April 19, 1943, he began proceedings to recover 317*l.* 17*s.* 2*d.*, included in which was the sum of 174*l.* 5*s.* 3*d.* in respect of purchase tax on goods supplied, which had not been included in the price quoted therefor. The only question calling for report was whether the plaintiff was entitled to recover from the defendants the purchase tax in respect of the goods supplied for which he was accountable to the Crown. Croom-Johnson J. held that the sub-contract was mainly for the sale of goods, and that, under the Finance (No. 2) Act, 1940, the plaintiff, as a registered seller of chargeable goods, was liable to account for the purchase tax payable in respect of the goods. There was nothing said in the sub-contract to throw on the defendants the burden of paying the purchase tax, but, having regard to s. 27 (1) of the Act, when two persons made, after the Act had come into force, a contract for the sale of goods which contained not a word about the tax, the buyer was the person ultimately liable to pay it. The defendants' defence with regard to the sum claimed for purchase tax, therefore, failed. The defendants appealed.

O'Sullivan K.C. and *Fortune* for the defendants. The sub-contract was not an agreement for the sale of goods. The plaintiff contracted to obscure the windows of a number of police stations, and, although that involved supplying black-out material, the transaction in its essence was a contract for work and services. If, however, as Croom-Johnson J. held, the contract was in the main for the sale of goods, it put the

(1) By Finance (No. 2) Act, 1940, s. 27: " The seller of " chargeable goods under a charge- " able purchase made in the " United Kingdom after the date " specified for the coming into " operation of the tax . . . . shall " add to any invoice or similar " document delivered by him to " the buyer a statement indicating " the amount due from the buyer " to the seller by reference to tax " for which the seller may be " accountable in respect of the " purchase."

defendants under no liability to pay the purchase tax. There is nothing in the Finance (No. 2) Act, 1940, to impose that liability on them. Even if there was not a chargeable purchase within s. 18, there must be deemed to be a chargeable purchase under s. 25, and s. 22 makes the plaintiff as the registered seller accountable for the purchase tax. Further, there is nothing in the Act to enable the plaintiff, as seller, to recover the tax from the defendants, as buyers. A seller who desires to pass on the burden of the tax to the buyer must provide for it expressly, and that is what the plaintiff failed to do here. Section 27 has been relied on as giving the plaintiff the right to recoupment by the defendants, but all that that provides is that the seller under a chargeable purchase made after the tax came into operation must add to any invoice delivered to the buyer a statement indicating the amount of the purchase tax. It only imposes a duty on the seller to state the amount of the purchase tax due in the invoice, and gives no right to pass on the tax to the buyer. The words of that section may be contrasted with those in s. 28 which gives a seller of goods under a contract made before the Act came into force the right to add the amount of the purchase tax to the price. Section 27 would have contained equally clear words had it been intended to impose a liability on a buyer to recoup the seller for the amount of the tax. The tax having been imposed before the sub-contract was entered into, it was for the plaintiff to see that a provision was inserted in that agreement for payment by the defendants of the amount of the tax in addition to the price agreed on: see *Paprika Ld.* v. *Board of Trade* (1).

Serjeant Sullivan K.C. and *T. F. Davis* for the plaintiff. The sub-contract was clearly an agreement for the sale of goods attracting purchase tax: see the definition of "chargeable "purchase" in s. 18. The tax being a "purchase tax" it is the purchase of goods and their delivery which attracts the tax. The whole language of the Act shows that Parliament contemplated that the purchaser would be the person to bear the tax. It is true that s. 22 makes the seller accountable for the tax, but that does not mean that he is personally to bear the burden. He accounts for tax the amount of which is paid to him by another person just as is often the case under other taxing enactments. He has the right to add the amount of the tax to the purchase price. Section 27 imposes an obligation on the buyer to pay the tax. It provides that the seller of chargeable goods shall add to any invoice delivered by him to the buyer "a statement "indicating the amounts due from the buyer to the seller by "reference to the purchase tax for which the seller may be "accountable in respect of the purchase." An invoice is a statement of the contract price of goods, and by s. 27 there is to be added to the document the amount due for purchase tax. That must make the tax due from the buyer to the seller who then accounts for the tax to the revenue authorities. It does not mean that the agreed purchase price is to be split up to show how much is attributable to tax. Section 28 is opposed to that view. Where the purchase price includes tax, it cannot concern the buyer to know how much of the price was tax. It is included in the invoice as an additional sum to be paid by the purchaser.

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(1) Ante, p. 327.

O'Sullivan K.C. replied.

Cur. adv. vult.

April 24. The judgment of the court was read by GODDARD L.J., who stated the facts and continued:

The first point taken by Mr. O'Sullivan for the defendants was that the sub-contract was not for a sale of goods, but was a contract for work and labour and the supply of material in connexion therewith. On this point we agree with the learned judge who has held that as the contract involved transferring to the defendants for a price chattels, namely, curtains, in which they had no previous property, it was a sale of goods. If one orders another to make and fix curtains at his house the contract is one of sale though work and labour are involved in the making and fixing, nor does it matter that ultimately the property was to pass to the War Office under the head contract. As between the plaintiff and the defendants the former passed the property in the goods to the defendants who passed it on to the War Office. It is unnecessary to elaborate this matter further.

The question then arises whether the seller of goods under a contract made after the purchase tax has been imposed by law can call on the purchaser to pay the tax exigible in respect of the sale in addition to the price at which he has agreed to supply the goods. Of course, if a seller quotes a price of X*l.* plus purchase tax the buyer must pay the amount of the tax, whatever it may be, as part of the purchase price, although the amount may not be mentioned at the time the contract is made. Conversely, it would seem clear that, if a seller agrees to supply goods for a certain sum, he cannot call on the buyer to pay anything for tax in addition unless the statute which imposes the tax authorizes the seller to recover it from the buyer. No doubt, the tax is called a purchase and not a sales tax and is charged on the wholesale value of chargeable goods bought under chargeable purchases, but that cannot of itself determine the question whether, in the absence of agreement on the matter, the incidence of the tax is to fall on buyer or seller.

We have, therefore, to examine the various sections of the Act dealing with the tax. Section 18 imposes the tax, and under that section chargeable purchases are purchases made from a wholesale merchant or manufacturer selling by wholesale with the exception of goods bought by a registered wholesale merchant as stock or by a registered manufacturer as materials for his business. By s. 22 the person accountable for the tax, where the purchase is made from a wholesale merchant or manufacturer, is the seller. This, again, is not conclusive of the matter. It makes the seller accountable for the tax so that he must pay it whether he can recover it from anyone else or not, but this section does not of itself empower the seller to collect it from the buyer. Section 23 provides for the registration of wholesale merchants and manufacturers. When they are registered, purchases by them of stock or material for manufacture do not attract the tax. Then, under s. 25, as soon as a wholesaler or manufacturer appropriates or applies goods for any of the purposes there specified the appropriation or application, which may not be a sale at all, is treated as a chargeable purchase and he is accountable for the tax which becomes due at the time of the appropriation or application. Section 27 is that on which Serjeant Sullivan mainly relied as entitling the seller, without any agreement to that effect, to throw the burden of the tax on to the buyer. That section requires the seller under a chargeable purchase made after the tax comes into operation to " add to any invoice or similar " document delivered by him to the buyer a statement " indicating the amount due from the buyer to the seller by " reference to tax for which the seller may be accountable in " respect of the purchase." The argument was that, as the section refers to the amount due from the buyer to the seller, it necessarily implies that the seller may charge the buyer with the tax. In our opinion, this argument is unsound. The section does not require or empower the seller to add anything except a statement to the invoice. If one transposes a few words at the end of the section so that it reads " a statement " indicating by reference to tax for which the seller may be " accountable in respect of the purchase the amount due from " the buyer to the seller," which, in our opinion, is its true reading, it then becomes clear that the effect is only to require that the invoice shall show the amount of the tax for which the seller has to account. The seller may agree, or be willing without any express agreement, to bear the tax or part of it, but the invoice must show the sum for which he is accountable.

The matter really becomes clear when s. 28 is considered. That section has the same object as s. 10 of the Finance Act, 1901, which, dealing with the imposition of new duties, whether of customs or excise, gives the seller of goods under a contract made before the new duties were imposed the right to add the amount to the contract price, or, if the duties are abolished or decreased, allows the buyer to reduce the price by the amount of the reduced duty. So, with regard to purchase tax. No doubt in the great majority of cases the seller would pass on the burden of the tax to the buyer. Consequently, this section provides, by sub-s. 1, that he may do so in respect of a contract made before the tax was imposed but which would be subject to tax when the time for the performance arrived, and sub-s. 2 gives a corresponding right to the buyer to make a deduction if the tax is reduced after the contract is made. In either case the right is given only in the absence of agreement to the contrary, and in the case of a buyer only " if the seller " has had . . . . the benefit of the tax not becoming chargeable " or becoming chargeable at the reduced rate." Observe that sub-s. 1 allows an addition to, and sub-s. 2 a reduction from, the *consideration*, that is, the price. Similarly, s. 21, sub-s. 1, which provides for the ascertainment of a wholesale value of goods in respect of which tax is chargeable, says that it is to be " the price which . . . . the goods would fetch . . . . *if* " *no tax were chargeable in respect of the sale*," thus indicating an assumption that normally the tax will be added to the purchase price by the seller. Where an article is taxed, whether by purchase tax, customs duty, or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price of an ounce of tobacco is what it is because of the rate of tax, but on a sale there is only one consideration though made up of cost plus profit plus tax. So, if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer. If the buyer agrees to the price, it is not for him to consider how it is made up or whether the seller has included tax or not.

Whether the purchase tax was to be regarded as part of the price had to be considered recently by the Divisional Court in *Paprika* v. *Board of Trade* (1). There the appellants had been convicted of certain rationing offences for which the prescribed penalty was three times the price which the articles, the subject of the charge, might be expected to fetch if lawfully sold. They were fined a sum which was more than three times the price of the goods if purchase tax was left out of account. The court held that whenever a sale attracts purchase tax that tax presumably affects the price which the seller, who is liable to pay the tax, demands, but it does not cease to be the price which the buyer has to pay even if the price is expressed to be X plus purchase tax, and the sentence was upheld. We agree with the decision. If s. 27 has the effect for which the plaintiff contends and gives him the right to demand the tax in addition to the price he has quoted, there would have been no necessity for s. 28. If, in the absence of agreement, he can demand the tax in respect of a contract made after the tax was in operation as an addition to the price, there would seem to be no reason why he should not do so in respect of one made before its imposition. Indeed, the latter would seem to be a case a fortiori. The truth is that s. 27 gives no right in any case to add the tax to the consideration for the sale. Whether the omission to take the tax into account when quoting was due to inadvertence or because the plaintiff thought that it would not be payable is immaterial.

Serjeant Sullivan adduced one further argument which, as we understood it, was that, as tax was not paid by government departments, the contract must be read as though there was an undertaking by the defendants to indemnify the plaintiff against tax, as they could recover any tax that was paid from the War Office. Apart from the consideration that no such case was either pleaded or suggested in the court below, we can see no ground for implying any such term. The plain fact is that the parties omitted to take purchase tax into consideration at all, and the incidence of the tax must lie

(1) Ante, p. 327.

C. A.

1944

LOVE
v.
NORMAN
WRIGHT
(BUILDERS),
LD.

where it falls. The plaintiff is accountable for it, but has shown no ground for recovering it from the defendants. The appeal must, therefore, be allowed, and the judgment will be reduced to 143*l*. 11*s*. 11*d*.

Appeal allowed.

Solicitors: *Langford, Borrowdale & Thain; White & Co.*

H. C. G.

HARMAN *v.* BUTT AND OTHERS.

1944
Mar. 16, 17, 30.

Atkinson J.

Cinematograph—Sunday performance—Licence—Condition that no child under sixteen be admitted—Action by licensee for declaration that condition ultra vires—Parties—Licensing powers of county council delegated to justices—Sunday Entertainments Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 51), *s.* 1, *sub-s.* 1.

Acting under s. 1, sub-s. 1, of the Sunday Entertainments Act, 1932, an authority having power to grant licences under the Cinematograph Act, 1909, allowed a cinematograph theatre in their area which was licensed under the Act of 1909 to be opened and used on Sundays for the purposes of cinematograph entertainments, subject to the condition that no child under the age of sixteen years should be admitted:—

Held, that the imposition of the condition was not ultra vires nor was the condition in the circumstances unreasonable.

The discretion to impose conditions conferred on an authority by the sub-section is unlimited, save that it must be exercised in a reasonable way.

A borough council had delegated to justices, under s. 5 of the Cinematograph Act, 1909, the powers conferred on it by that Act. In an action against the council and the justices by the licensee of a cinematograph theatre licensed under the Act for a declaration that a condition imposed by the authority under s. 1, sub-s. 1, of the Sunday Entertainments Act, 1932, on the opening of the theatre on Sundays was ultra vires and unreasonable:—

Held, that it was not necessary for the licensee to join the council as defendants, and they must be dismissed from the action.

ACTION tried by Atkinson J.

On April 25, 1940, a certificate under the Defence (General) Regulations, 1939, reg. 42 B, was furnished to the W. borough council, by the competent Air Force authority that, as large numbers of His Majesty's Forces were quartered in or in the neighbourhood of W., it was expedient that places in that area licensed under the Cinematograph Act, 1909, should be opened on Sundays for the purpose of cinematograph entertainments. On June 17, 1940, a draft order providing for the extension of s. 1 of the Sunday Entertainments Act, 1932, to the area was submitted by the council to the Secretary of State and it was approved by both Houses of Parliament in accordance with s. 1, sub-s. 5, of that Act. In October, 1942, the licensing authority (the justices, to whom the county council had delegated their powers under s. 5 of the Cinematograph Act, 1909) granted to the plaintiff, the licensee of the Regent Picture House, W., permission to have performances on Sundays, subject to the condition that no child under the age of sixteen years should be admitted. By the present action against the county council and the justices, the plaintiff claimed a declaration that the condition was ultra vires and unreasonable.

Beney K. C. and *S. H. Lamb* for plaintiff. The condition imposed by the justices was ultra vires and unreasonable. In *Theatre de Luxe (Halifax) Ld.* v. *Gledhill* (1) the Divisional Court, by a majority, held that in granting a licence under the Cinematograph Act, 1909, the licensing authority acted ultra vires in attaching a condition that children under fourteen years of age could not be allowed on the premises after 9 p.m. unaccompanied by a parent or guardian. The majority of the court (Lush and Rowlatt JJ.) were of opinion that conditions imposed must be in relation to the exercise of the powers granted in connexion with the running of the cinematograph theatre, such as those for the safety of the public, the protection of employees, or periods of opening. The decision of the majority was right and should be followed, although it is conceded that it has been qualified to some extent. All the members of the court agreed that the test of validity was whether the condition sought to be imposed was reasonable, and this condition is not reasonable.

Sellers K. C. and *Vernon Gattie* for the defendants. Apart from authority, the case for the plaintiff is unarguable, and the sole authority in his favour is the majority decision in *Theatre de Luxe (Halifax) Ld.* v. *Gledhill* (1) which has never been followed by any court. The dissenting judgment of Atkin J. has always been preferred, and it should be followed

(1) [1915] 2 K. B. 49.

in this case. In *Rex* v. *Burnley Justices* (1) Darling J., said (2) that he preferred the dissenting judgment of Atkin J., in the *Halifax* case (3), and Avory J., said (4) that the *Halifax* case (3) should only be followed, when the same facts existed: see also *Mills* v. *London County Council* (5). In *London County Council* v. *Bermondsey Bioscope Co., Ld.* (6) Lord Alverstone C.J. said that s. 2 of the Cinematograph Act, 1909, was intended to confer on the licensing authority a discretion to impose conditions so long as they were not unreasonable (7), and it was there held that a general restriction on Sunday opening was not unreasonable If total closing is not unreasonable, exclusion of a section of the public, i.e., children, is not unreasonable, particularly where the opening is only allowed on the request of the naval, military, or air force authority for the benefit of His Majesty's forces. The judgment of Lord Alverstone C.J. in *London County Council* v. *Bermondsey Bioscope Co.* (6) was approved by the Court of Appeal in *Rex* v. *London County Council* (8) where it was held that the discretion granted to the licensing authority enabled them to impose conditions other than those for securing safety. The inquiry to be made by the licensing authority is of an objective character and it is irrelevant to consider what actuated their minds in the exercise of their discretion. The powers given to the licensing authority by the Sunday Entertainments Act, 1932, are expressed in the widest terms, the words in s. 1, sub-s. 1, being "subject to such conditions "as the authority think fit to impose."

Beney K.C. replied.

Cur. adv. vult.

Mar. 30. ATKINSON J. Since the county council delegated their powers under s. 5 of the Cinematograph Act, 1909, to the justices, it was not necessary for the plaintiff to join the council as defendants, and they must be dismissed from the action.

It is apparent that there are at least three totally different occasions on which licensing justices may be called on to exercise their discretion to issue a licence and to determine on what conditions the licence shall be issued. The application may be under the Cinematograph Act, 1909, relating to six days of the week, excluding Sundays. It may be one relating solely to Sundays under the Sunday Entertainments Act, 1932, where in the case of a borough the majority of the local government electors have expressed a desire for Sunday performances. Thirdly, it may be one where the local government electors have expressed no such wish, but where the application is made for the benefit of those members of the forces, who are stationed in the neighbourhood for the time being. The main contention of the plaintiff is that this condition, excluding children under the age of sixteen, is ultra vires, and that contention rests on a majority decision of the Divisional Court in *Theatre de Luxe* (*Halifax*), *Ld.* v. *Gledhill* (1) to the effect that under s. 1 of the Cinematograph Act, 1909, the power of the licensing authority to impose conditions is limited to the imposing of conditions which relate to the exercise of the powers granted under the licence, and does not extend to imposing conditions relating to the public interest, however necessary they may be. A secondary contention is that, if he is wrong as to this, at any rate the conditions must be reasonable, and that this condition is unreasonable. The decision in *London County Council* v. *Bermondsey Bioscope Co., Ld.* (2), that a county council, in granting a licence under s. 2 of the Cinematograph Act, 1909, have power to insert therein a condition that the premises shall not be opened under the licence on Sundays, Good Friday or Christmas Day is not very relevant but what is of interest is the broad statement of the measure of discretion granted to the licensing authority. Lord Alverstone C.J., said (3): "It has never yet, however, "been laid down that, if the language of an Act is clear, full "effect is not to be given to it, because it goes beyond the "title. The language of s. 2, sub-s. 1, seems to me to be "quite clear, and we must therefore construe it according to "its plain meaning. In my opinion that section is intended "to confer on the county council a discretion as to the "conditions which they will impose, so long as those conditions "are not unreasonable." And again (4): "That decision"—*Reg.* v. *West Riding County Council* (5) . . . . "seems to me

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(1) (1916) 115 L. T. 525.
(2) Ibid, 529.
(3) [1915] 2 K. B. 49.
(4) Ibid. 530.
(5) [1925] 1 K. B. 213.
(6) [1911] 1 K. B. 445.
(7) Ibid. 450.
(8) [1915] 2 K. B. 466.

(1) [1915] 2 K. B. 49.
(2) [1911] 1 K. B. 445.
(3) Ibid. 451.
(4) [1911] 1 K. B. 452.
(5) [1896] 2 Q. B. 386.

1944

HARMAN v. BUTT.

Atkinson J.

"to be only an illustration of the recognized principle that, "when powers are entrusted to a public body, the court will "be slow to interfere with the exercise by them of those powers. "With regard to the case of *Kruse* v. *Johnson* (1) the decision "again shews that the court ought to be slow to hold "that a by-law made by a public representative body is "void for unreasonableness. The question which we have "in this case to consider is simply whether the condition is "beyond the powers of the county council." Pickford J., said (2): "If. that enactment"—s. 2.—"stood "alone, I do not see how it could be denied that, subject to "the regulations of the Secretary of State, the county council "might impose such conditions, so long as they were not "unreasonable, as they thought right." Here, then, is a very plain declaration that the only limitation on the discretion of the licensing authority under the Cinematograph Act, 1909, s. 2, is that of reasonableness.

That decision was referred to with unqualified approval by the Court of Appeal in *Rex* v. *London County Council* (3). In *Theatre de Luxe* (*Halifax*) *Ld.* v. *Gledhill* (4), the case on which the plaintiff relies, a licence was granted under s. 2 of the Act of 1909, subject to the following condition: "Children "under fourteen years of age shall not be allowed to enter "into or be in the licensed premises after the hour of 9 p.m. "unaccompanied by a parent or guardian. No child under "the age of ten years shall be allowed in the licensed premises "under any circumstances after 9 p.m." It was held by Lush and Rowlatt JJ., that the condition was ultra vires inasmuch as there was no connexion between the ground on which the condition was imposed, namely, regard for the health and welfare of young children generally, and the subject-matter of the licence, namely, the use of the premises for the giving of cinematograph exhibitions. The principle there laid down was that conditions imposed on the grant of a licence must relate to the use of the premises and that conditions based on the public interest were ultra vires. Atkin J. dissented, saying that the restriction on the power of the licensing authority to impose conditions was that they must be reasonable and that they must be in respect of the licensed premises and in the public interest. Subject to these limitations, he did not think that there was any fetter on the power of

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(1) [1898] 2 Q. B. 91..

(2) [1911] 1 K. B. 453

(3) [1915] 2 K. B. 466.

(4) [1915] 2 K. B. 49.

1944

HARMAN
v.
BUTT.

Atkinson J.

the licensing authority to impose conditions. Atkin J. expressed himself strongly on the point, saying that he thought the justices were entitled to consider the interests of the community or of any section of the community. I do not think it unfair to say that the decision of the majority has never been referred to by the court with approval.

Ellis v. *North Metropolitan Theatres* (1) is not very helpful, except for the observation of Bray J. when he was referring to the *Halifax* case (2). He said (3): " The ground upon which " the court there proceeded was that s. 3 [of the Act of " 1909] which makes it an offence in the occupier of the " licensed premises to allow them to be used in contravention " of the conditions on which the licence was granted, was " dealing with conditions which affect the user of premises " by the licensee, and that a condition which restricted their " use not by the licensee but by visitors of a tender age was " not within the Act and was invalid." In *Rex* v. *London County Council* (4) it was held that the council, as the licensing authority under the Act of 1909, could, in the exercise of their discretion, refuse to grant licences to a company the majority of whose shareholders were alien enemies. Lord Reading C.J. said (5): " The question for the consideration of the council, " subject to a point hereinafter mentioned upon the Cinematograph Act, was whether acting with due regard to the " public interest, the renewal of the licences should be granted " to the secretary of the company on behalf of the company," and he held that the council could have regard to the public interest. Later, he said (6): " It must be borne in mind that " this court, in determining whether or not the mandamus " should issue, is not exercising appellate jurisdiction. We " are not entitled to decide according to the view we should " have taken in the first instance had the matter come before " us. We should only order the mandamus to issue if we came " to the conclusion that the council, by taking into consideration the enemy character of the constitution of the " company, had allowed their minds to be influenced by " extraneous considerations," and then came this important sentence: " The council in these matters are the guardians of " the public interest and welfare . . . . I cannot hold that " such considerations are extraneous or extra-judicial. These

(1) [1915] 2 K. B. 61.
(2) [1915] 1 K. B. 40.
(3) [1915] 2 K. B. 68.
(4) [1915] 2 K. B. 466.
(5) Ibid. 472.
(6) Ibid., 475–6.

" exhibitions exercise a powerful influence, often too powerful " an influence, upon the minds of the young; sometimes also " upon the minds of others. I cannot think that a court of " law would be justified in treating such considerations " as beyond the limits to which a man could look who was " desirous of discharging his duty honestly to the best of his " ability, and with his mind directed solely to the public " interest of the realm at a critical period of its history." He also said (1): " It was urged by Sir Edward Carson that under " the Cinematograph Act, 1909, the powers vested in the " council are restricted to making provisions and imposing " conditions for securing the safety of the public and other " persons at the exhibition of inflammable films, and that " therefore the council could not take into consideration " the enemy character of the directorate or shareholding " of the company," and he went on to dissent from that view. In the Court of Appeal the views expressed by Lord Reading C.J. were approved unreservedly, Buckley L.J., saying (2): " If acting bona fide, they [the licensing authority] " thought that was a circumstance which ought to guide them " in the exercise of their discretion, it was for them and not " for us to determine." *Rex* v. *London County Council* (3) seems to me to be a strong authority that, even under the Cinematogaph Act, 1909, the licensing authority are entitled to consider matters of public interest.

In *Rex* v. *Burnley Justices* (4), another case under the Act of 1909, a condition was imposed as to the hours of opening and another that no film should be shown if it was objected to by three justices. In addition, two undertakings were demanded, one that children should not be tempted to spend time at the cinematograph theatre by gifts of sweets or souvenirs, and another that, on the notification by a medical officer of health that any department of a public elementary school had been closed owing to the prevalence of an infectious disease, the licensee should exclude from the theatre all children attending school. The application for mandamus which was based on the grounds that these conditions were ultra vires and the demand for the undertakings was unreasonable failed, though the last undertaking was modified so that it only related to the school at which the disease was prevalent. Darling J. said (5): " What is the position of

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(1) [1915] 2 K. B. 477.
(2) Ibid. 488.
(3) [1915] 2 K. B. 466.
(4) 115 L. T. 525.
(5) Ibid. 528–9.

"the justices? Are they fettered in any way, except so far "as the regulations of the Secretary of State are concerned? "In my view they are not. It seems to me that the justices "are absolutely free as to the grant or the refusal of a licence. "It is clear that they are under no obligation to grant a licence "to any person at all. The section which I quoted" (s. 2, sub-s. 1, of the Act of 1909) "says that the licensing authority "'may grant licences to such persons as they think fit,' for "the purpose of cinematograph exhibitions. This leaves "the justices a very free hand in the matter of imposing "conditions or asking for undertakings when an application "is made for a licence . . . . It has been argued before us "that they would be bad as conditions, and reliance has "been placed upon the decision in *Theatre de Luxe* (*Halifax*) "*Ld.* v. *Gledhill* (1). Speaking for myself I prefer the "judgment of Atkin J., to the judgments of the other two "members of the court and, if I was at liberty to follow the "judgment of Atkin J., I should most certainly do so. But "when the judgments of the majority are closely examined, "it is clear that they only apply to conditions and not to "undertakings." The view which was taken by the justices "in the present case was undoubtedly a reasonable one." Speaking for myself, I do not think there is any difference in this connexion between a condition and the requirement of an undertaking. Avory J., said (2): "As to the undertakings, "I think that both of them would be good as conditions. And "if they are good as conditions, they are also good as under- "takings. It does not seem to me that they in any way violate "the principle laid down in the case of *Theatre de Luxe* "(*Halifax*) *Ld.* v. *Gledhill* (1). That case has been criticized "and I must say that I think it is only an authority which "should be followed when the same facts are in question, "as they were there. We are bound by the decision there "given, if the same state of facts exists, but the present case "is different." I have difficulty in following that reasoning, because, in my view, the *Halifax* case (1) laid down a principle. What is clear is that the Divisional Court, which was of co-ordinate jurisdiction with the court which decided the *Halifax* case (1), was not inclined to follow the *Halifax* case (1) unless it was driven to it.

In *Mills* v. *London County Council* (3) a licence was granted

(1) [1915] 2 K. B. 49.

(2) 115 L. T. 530.

(3) [1925] 1 K. B. 213.

under the Act of 1909 subject to a condition that "no film—" other than photographs of current events—which has not "been passed for universal exhibition by the British Board of "Film Censors shall be exhibited in the premises without the "express consent of the council during the time that any "child under or appearing to be under the age of sixteen years "is therein, provided that this condition shall not apply in "the case of any child who is accompanied by a parent or "bona fide adult guardian of such child." The *Halifax* case (1) was dealt with by counsel on both sides and, if it were to be followed, one would have thought that the condition under consideration would have been held to be ultra vires. The decision in the *Halifax* case (1) was not mentioned in any one of the judgments of Lord Hewart C.J., Shearman J., and Salter J., and the condition was held to be not ultra vires. In *Rex* v. *London County Council* (2), a decision before the passing of the Sunday Entertainments Act, 1932, a licence was granted which included permission to exhibit on Sundays. It was held that the council had no power to dispense with the provisions of the Sunday Observance Act, 1781.

Those, I think, are all the cases bearing on this question. I can see no justification here for cutting down the discretion given to the licensing authority by the Sunday Entertainments Act, 1932, which is unlimited in its terms. By s. 1, sub-s. 1, of the Act the licensing authority may allow places in the area licensed under the Act of 1909 to be used on Sundays "subject "to such conditions as the authority think fit to impose." These words give a discretion, which relates only to opening on Sundays, additional to that granted under the Act of 1909. Bearing in mind the expressions of judicial opinion that the decision in the *Halifax* case (1) only applies where the facts are precisely the same, I feel that I am at liberty to hold that it has no bearing on an application under a different Act, relating only to Sundays, and that the discretion of the licensing authority is not subject to the limitation imposed in that case, but is unlimited save that it must be exercised in a reasonable way. I am satisfied that the defendants were entitled to consider matters relating to the welfare, including the spiritual well-being, of the community and of any section of it, and I hold that this condition that no child under the age of sixteen should be admitted to this cinematograph theatre on Sunday is not ultra vires on

(1) [1915] 2 K. B. 49.

(2) [1931] 2 K. B. 215.

the ground that it is not confined to the user of the premises by the licensee, but relates to the interest of a section of the community.

It remains for me to consider whether the condition has been proved to be unreasonable. The cases show that the courts ought not lightly to declare conditions unreasonable when the licensing authority, to whom the power of imposing conditions has been given, has after much thought and argument come to the conclusion that they are reasonable and proper. The justices know the neighbourhood and the people who inhabit it. They know far more about their wishes and habits than any court can know, and they know the relevant circumstances. The Sunday Observance Act, 1781, is still law, not because it has been forgotten or overlooked, but by the deliberate desire of Parliament. Prima facie, the law is that a house open for public entertainments on a Sunday, to which admission is by payment, is illegal. Parliament has granted to a borough or a county council power to submit a draft order to the Secretary of State to be laid before Parliament for Sunday opening if the local government electors desire it. The electors of the borough with which we are concerned have not expressed such a desire. I am entitled to assume that there were and are in the borough a number of people who believe in the observance of Sunday and want their children to grow up with a reverence for Sunday and to go to church and Sunday-schools and who do not want them to substitute for these duties attendance at an exhibition of films, particularly of films chosen for members of the forces and not because of their suitability for children. There may also be those who want their children on Sunday to get into the open air as much as possible and to attend the exercises of scouts and other training corps instead of spending several hours in an atmosphere hazy with tobacco smoke. Can any one doubt that it is for the good of children under the age of sixteen to keep out of cinematograph theatres on Sundays? I, certainly, have no doubt about it. This licence was granted on the ground that large numbers of members of the forces were quartered in, or in the neighbourhood of, this borough. I gathered that it was conceded that a condition limiting audiences to members of the services would be unobjectionable, but, be that as it may, why is it unreasonable for the licensing authority to say: "We feel that we must accede to the view "of the competent naval, military or air force authority as to

1944

HARMAN
v.
BUTT.

Atkinson J.

"the provision of cinematograph exhibitions for members "of the forces on Sunday, but we should not make a greater "inroad into the observance of Sunday than is reasonably "necessary, and, in particular, we should not let this licence "operate to the disadvantage of the young." That the plaintiff believes that an appreciable number of children would be induced to go to this cinematograph theatre on Sunday is plain. Otherwise there would not be this litigation. I am not prepared to hold that the defendants were acting unreasonably when they said that they would only grant the licence if admission were refused to children of an age when they are easily influenced to act otherwise than in accordance with the general law as to the observance of Sunday and with what they had reason to believe were the wishes of the majority of the local government electors in the borough and in a way which would be detrimental to their health. There are other considerations. Sunday audiences at this cinema consist almost entirely of men of the forces. The environment is not one suitable for girls under the age of sixteen. I cannot shut my eyes to the distressing facts with which no judge of assize nor any magistrate can fail to be familiar. Again, the evidence was that there would be occasions when specially attractive films were shown when, if children were admitted, members of the forces might be turned away or required to buy the more expensive seats. I understand the justices to mean, when they said that no case had been made out for the admission of children, that they were satisfied that in the interests of the children this condition should be imposed. In my opinion, this action must fail.

Judgment for defendants.

Solicitors for plaintiff: *Norman Hart and Mitchell.*

Solicitors for defendants: *Sharpe, Pritchard and Co., for Clerk of the Peace and of the S. County Council.*

C. G. M.

1944
Mar. 23, 24.

Tucker J.

LOVELL *v.* BLUNDELLS AND T. ALBERT CROMPTON & COMPANY, LIMITED.

Negligence—Master and servant—Factory—Repair of ship in wet dock—Injury to workman—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 26, *sub-s.* 1; *s.* 60; *s.* 106, *sub-s.* 1; *s.* 151, *sub-s.* 1; *s.* 159, *sub-s.* 1*—Shipbuilding Regulations,* 1931 (*St. R. & O.*, 1931, *No.* 133), *regs.* 1, 11.

The plaintiff, a boiler maker, was employed by the defendant company to clean and overhaul the boilers of a ship when in wet dock. To expand the tubes, rendering them steam-tight, he had to enter a combustion chamber, and, to reach the higher tubes, he required staging some four feet high. He had not been directed where to get, and was not provided with, materials for the staging, but, obtaining a plank from the engine room and a wooden wedge from the stokehole, he wedged the plank on certain projecting stays against the side of the combustion chamber. After he had been working for some time on the staging, it collapsed, and he fell to the floor of the chamber and was injured:—

Held, (1.) that the defendants were in breach of their obligation at common law to provide the plaintiff with proper plant and materials; (2.) that the joint effect of s. 60, s. 106, sub-s. 1, and s. 159, sub-s. 1, of the Factory Act, 1937, was that the Shipbuilding Regulations, 1931, did not apply so as to make the defendants liable, under reg. 1, to provide the plaintiff with safe means of access to his work, or under reg. 11, to provide him with proper material for the construction of staging; (3.) that neither the ship nor the boiler was a "factory" within the meaning of s. 151, sub-s. 1, of the Act of 1937, and, therefore, the defendants were not liable to the plaintiff for breach of the obligation imposed on them by s. 26 of that Act to provide him with safe means of access to his work, the words "safe means of access" in reg. 1 of the Shipbuilding Regulations, 1931, and s. 26 of the Factory Act, 1937, referring to a safe way for the workman to get to his work and not to an appliance, such as staging, connected with the performance of the work, when once he has arrived at the place of work.

Garcia v. *Harland and Wolff, Ld.* [1943] K. B. 731, followed.

ACTION tried by Tucker J.

The plaintiff, a boiler maker, was employed by the defendant company to clean and overhaul the boilers of a ship when in wet dock. To expand the tubes to render them steam-tight he had to enter a combustion chamber, and to reach the higher tubes he required a staging some four feet high. He had not been directed where to get, and was not provided with, materials for the staging, but, obtaining a plank lying in the engine room and a wooden wedge from the stoke hole,

1944

LOVELL
v.
BLUNDELLS
AND
T. ALBERT
CROMPTON
& CO., LD.

he wedged the plank on certain projecting stays against the side of the combustion chamber. While he was standing on the staging at work the staging collapsed, and he fell to the floor of the chamber and was injured. His action was based on (*a*) failure by the defendants to comply with their common law obligation to provide proper and suitable plant and appliances and a safe system of working; (*b*) breach of regs. 1 and 11 of the Shipbuilding Regulations, 1931 (1); and (*c*) breach of s. 26 of the Factories Act, 1937 (1). The defendants pleaded contributory negligence and "volenti non fit injuria."

(1) By Factories Act, 1937, s. 26: "(1.) There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work."

By s. 60 (contained in Part IV. of the Act): "(1.) Where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour, used in factories is of such a nature as to cause risk of bodily injury to persons employed in connexion therewith, or any class of those persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case. (2.) Special regulations so made may, among other things . . . . (*b*) prohibit, limit, or control the use of any material or process; or (*c*) modify or extend with respect to any class or description of factory any provisions of Part I., Part II. or this Part" (Part IV.) "of this Act, being provisions imposing requirements as to health or safety; and may impose duties on owners, employed persons and other persons, as well as on occupiers."

By s. 106: "(1.) Subject as hereinafter in this section provided, the provisions of this Act hereinafter in this section mentioned shall apply to any work carried out in a harbour or wet dock in constructing, reconstructing, repairing, refitting . . . . a ship or in scaling, scurfing or cleaning boilers (including combustion chambers and smoke boxes) in a ship . . . that is to say:— . . . . (*b*) the provisions of Part IV. with respect to special regulations for safety and health; . . . . and for the purpose of such provisions the ship shall be deemed to be a factory, and any person undertaking such work shall be deemed to be the occupier of a factory."

By s. 151:—"(1.) Subject to the provisions of this section the expression 'factory' means any premises in which or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely:— (*a*) the making of any article or of part of any article; or (*b*) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article; or (*c*) the adapting for sale of any article; being premises in which or within the close or curtilage

1944

LOVELL
v.
BLUNDELLS
AND
T. ALBERT
CROMPTON
& CO., LD.

Edgedale for the plaintiff. The defendants were in breach of their duty at common law to furnish the plaintiff with good and sufficient materials and apparatus for his work and a safe system of working: *Wilsons and Clyde Coal Co. Ld.* v. *English* (1), and they have failed to establish either the defence of contributory negligence or of "volenti non fit injuria." Alternatively, the defendants were in breach of regs. 1 and 11 of the Shipbuilding Regulations, 1931. Contrary to reg. 1, they failed to provide safe means of access to that part of the ship to which the plaintiff was required to proceed in the course of his employment, namely, to the top of the combustion chamber, and, contrary to reg. 11, they failed to supply sound and substantial material for the construction of the staging and to see that the staging was securely constructed of sound and substantial material and was maintained

"or precincts of which, the work "is carried on by way of trade or "for purposes of gain and to or "over which the employer of the "persons employed therein has "the right of access or control: "And (whether or not they are "factories by reason of the foregoing definition) the expression "'factory' also includes the "following premises in which "persons are employed in manual "labour, that is to say:—(i) any "yard or dry dock (including the "precincts thereof) in which ships "or vessels are constructed, reconstructed, repaired, refitted, "finished or broken up; . . . ."

By s. 159, sub-s. 1, which, with sch. IV to the Act, repeal the Factory and Workshop Act, 1901:— "Provided that any order, regulation . . . . made . . . . under "any enactment repealed by this "Act which is in force at the "commencement of this Act shall "continue in force and shall have "effect as though it had been made ". . . . under this Act, and, in "so far as it could have been "made . . . . under a particular "provision of this Act, shall be "deemed to have been made . . . "under that provision . . . ."

By Shipbuilding Regulations, 1931, made by the Secretary of State under s. 79 of the Factory and Workshop Act, 1901:—"1. "Safe means of access shall be "provided to all parts of the ship "to which persons employed may "be required to proceed in the "course of their employment ". . . . 11 (*a*). A sufficient "supply of sound and substantial "material shall be available in a "convenient place or places for "the construction of *staging*; (*b*) "All *staging* shall (i) be securely "constructed of sound and substantial material and shall be "maintained in such condition as "to ensure the safety of all persons "employed; (ii) be inspected at "regular and frequent intervals by "a competent person. (*c*) All "planks intended to be used for "*staging* shall (i.) be carefully "examined before being taken "into use, (ii.) be re-examined "before they are used again "after the *stages* have been "dismantled, by a person qualified "to detect faults in timber."

(1) [1938] A. C. 57.

1944

LOVELL *v.* BLUNDELLS AND T. ALBERT CROMPTON & Co., LD.

in such condition as to ensure the safety of the plaintiff. The Shipbuilding Regulations, 1931, were made under s. 79 of the Factory and Workshop Act, 1901. That is the combined effect of s. 106, sub-s. 1 (by which the provisions of inter alia Part IV. of the Act are to apply to work carried on in a wet dock in cleaning ships' boilers), of s. 60 (which is in Part IV. of the Act and gives the Secretary of State power to make special regulations for safety), and of s. 159, sub-s. 1 (which, while repealing inter alia the Factory and Workshop Act, 1901, provides that any regulations made under that Act shall continue in force and have effect as if made under the Act of 1937). *Fitzpatrick* v. *C. & H. Crighton (1921) Ld.* (1). Atkinson J., in *Garcia* v. *Harland and Wolff Ld.* (2) did not follow the decision of Stable J., in *Fitzpatrick* v. *C. & H. Crighton (1921) Ld.* (1), but it is submitted that the decision of Stable J. was right. See *Miller* v. *William Boothman and Sons, Ld.* (3).

Lastly the defendants were under a duty to provide safe means of access to the top of the combustion chamber by s. 26, sub-s. 1 of the Factories Act, 1937, since the ship and the boiler each constitute a factory within the meaning of s. 151 of that Act.

[*Whitten* v. *Army and Navy Stores* (4); *Wood* v. *London County Council* (5); *Paine* v. *Colne Valley Electric Supply Co., Ld.* (6) and *Murray* v. *Schwachman Ld.* (7) were also referred to.]

Montague Berryman for the defendants. There was no breach of the defendants' obligations at common law. Even if there were such a breach, it did not cause the accident which must have been due to the way in which the plaintiff himself wedged the plank in position. The Shipbuilding Regulations, 1931, do not apply to the present case. The court should follow the decision of Atkinson J. in *Garcia* v. *Harland and Wolff Ld.* (2) to that effect. A ship in a wet dock or harbour is not a "factory" save to the extent that s. 106 of the Factories Act, 1937, makes it so. That section merely provides that certain provisions of the Factory Act, 1937, shall apply

(1) (Unrep.) Nov. 14, 1921, but see [1943] K. B. 738–9.

(2) [1943] K. B. 731.

(3) Ante p. 337.

(4) [1943] K. B. 580.

(5) [1941] 2 K. B. 232.

(6) (1938) 55 T. L. R. 181.

(7) [1938] 1 K. B. 130.

to certain work carried out in a ship so situated, one of those provisions being s. 60 of that Act which empowers the Secretary of State to make special regulations as to safety and health, but s. 106 does not provide that for the purpose of existing regulations the ship shall be deemed to be a "factory." In *Smith* v, *Cammell Laird & Co., Ld.* (1), which dealt with s. 104 of the Factory and Workshop Act, 1901, a section which may be compared with s. 106 of the Act of 1937, Lord Russell of Killowen said (2) that s. 104 did not operate to apply to the "notional factories" thereby created the provisions of the Shipbuilding Regulations, 1931, so that the person having the actual use or occupation of the dock should be deemed to be the occupier : see also the observations of Lord Wright (3). No doubt, s. 159 of the Act of 1937 keeps the Shipbuilding Regulations, 1931, alive, but it does not apply them to a ship in a wet dock or harbour. The final words of s. 159, sub-s. 1, are : "any order or regulation of the "Secretary of State which continues in force by virtue of "this proviso may, in so far as may be necessary to bring it "into conformity with this Act, be varied or revoked by an "order made by him under this Act." The Secretary of State, therefore, could vary the Shipbuilding Regulations, 1931, by making them apply to a ship in a wet dock or harbour, but he has not done so. If the plaintiff's contention were right any regulations made under the Act of 1901 which could be brought within the provisions of s. 106 would be applicable to a ship in harbour or wet dock, though the regulations purported to be dealing with a totally different subject-matter. The decision in *Miller* v. *William Boothman & Sons Ld.* (4) is not material on this issue. "Safe means of "access," within the meaning of para. 1 of the Shipbuilding Regulations, 1931, or s. 26 of the Factories Act, 1937, refers to a safe way for the person employed to get to his work, and not to a safe appliance for performing that work once he has arrived at the place of work. Further a ship, whether on the high seas or in harbour or wet dock is not a factory within the meaning of s. 151 of the Factories Act, 1937, nor was the work here "carried on by way of trade or for purposes of "gain," within the meaning of s. 151, sub-s. 1 ; *Wood* v. *London County Council* (5).

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(1) [1940] A. C. 242.

(2) Ibid. 261-2.

(3) Ibid. 270.

(4) Ante p. 337.

(5) [1941] 2 K. B. 232.

Edgedale replied.

1944

LOVELL
v.
BLUNDELLS
AND
T. ALBERT
CROMPTON
& CO., LD.

TUCKER J. I do not decide that it was an unsafe system to allow the plaintiff to erect his own staging in the combustion chamber, he not being a shipwright, but, in my opinion, the defendants were in breach of their common law obligation, as stated by Lord Wright in *Wilsons and Clyde Coal Co., Ld.* v. *English* (1), to furnish the plaintiff with proper plant and materials. I have come to the conclusion that the defendants failed to supply the plaintiff with the plant which was necessary for the work he had to perform and they have not established either of their defences of contributory negligence or volenti non fit injuria.

In arriving at these decisions I may be wrong, and so it becomes necessary for me to consider the two other claims put forward by the plaintiff. He claims that the defendants are in breach of the Shipbuilding Regulations, 1931, made by the Secretary of State under s. 79 of the Factory and Workshop Act, 1901, in respect of the construction and repairing of ships in shipbuilding yards, which, he contends, are applicable to a ship in a wet dock. He relies on two of these regulations the first being reg. 1. In my view, there was no failure by the defendants to provide the plaintiff with " safe means of access," within the meaning of reg. 1. My reading of these words is that they are designed to ensure a safe way for the person employed getting to his work, but do not refer to a safe appliance connected with the performance of the work when once he has arrived at the place of work. If a workman is painting the side of a ship, safe provision must be made to enable him to get to the position of his work, but if, after he has got there, something goes wrong with the staging or cradle which is necessary to keep him in a position to paint the side of a ship, that is not due to a failure to provide " safe means of access."

The other regulation relied on is reg. 11, and if the Shipbuilding Regulations, 1931, are applicable, it is clear that the defendants are in breach of that regulation. The question whether these regulations are applicable to a ship in wet dock raises a problem, which is by no means easy of solution. Counsel for the plaintiff refers first to s. 106, sub-s. 1, of the Factories Act, 1937, which certain provisions of the Act are to apply to " any work carried out in a harbour or wet dock

(1) [1938] A. C. 57.

1944

LOVELL
v.
BLUNDELLS
AND
T. ALBERT
CROMPTON
& CO., LD.

Tucker J.

"in . . . . refitting . . . a ship or in . . . cleaning "boilers . . ." and one of these provisions is s. 60 of the Act. Section 106, sub-s. 1, enables the Secretary of State to make, under s. 60, regulations which are applicable to a ship in a wet dock. So far as I am aware, the Secretary of State has not made any such regulations, but counsel for the plaintiff contends that by reason of s. 159, sub-s. 1, the Shipbuilding Regulations, 1931, which were made under s. 79 of the Factory and Workshop Act, 1901, and could have been made under s. 60 of the Act of 1937, must be deemed to have been made under s. 60. On this issue Stable J., in *Fitzpatrick* v. *C. & H. Crighton (1921) Ld.* (1), part of whose judgment is quoted by Atkinson J., in *Garcia* v. *Harland and Wolff Ld.* (2), and Atkinson J. in the latter case have taken different views. Stable J. took the view that the result of s. 159, sub-s. 1, was to make the Shipping Regulations, 1931, applicable to a ship in wet dock, since they must be deemed to have been made under s. 60. Atkinson J., however, said (2): "Regret-"fully I cannot bring myself to take the same view. It seems "to me that all that the final words in s. 106 do is to provide "that 'for the purpose of such provisions,' that is, the "provisions of s. 60, 'the ship shall be deemed to be a factory.' "The section does not say: 'for the purpose of existing "'regulations the ship shall be deemed to be a factory,' but "'for the purpose of such provisions,' that is, that the "Secretary of State, under s. 60, shall have power to make "regulations which shall refer to a ship in a wet dock, "and to impose on persons undertaking work on it any duties "which he thinks fit. I cannot see how the mere fact that "the Secretary of State can make regulations which shall "apply to the repair of a ship in a wet dock, can alter the "meaning of the regulations which impose duties on occupiers "of shipbuilding yards and on no one else except persons "undertaking work in a public dry dock. I am asked to say "that these regulations are to be deemed to be recast, but in "what way and in what form is the recasting to take effect? "I cannot think there is anything in this Act of Parliament, "which is intended to change the wording of the Shipbuilding "Regulations, 1931. They are to be deemed to be kept "alive. If they had been made under one form of order, and "the Act of 1937 required a different form of order for such "a purpose, the regulations would be deemed to have been

(1) (Unrep.) Nov. 14, 1921.

(2) [1943] K. B. 739–40.

"made under the different form of order. It would seem "that the final words of s. 159, sub-s. 1 strongly support "the view which I take: 'that any order or regulation "'of the Secretary of State which continues in force by "'virtue of this proviso may, in so far as may be necessary "'to bring it into conformity with this Act, be varied or "'revoked by an order made by him under this Act.' "That means that if the Secretary of State thinks "it right to vary the existing regulations and make them "apply to a ship being repaired in a wet dock, he has power "to do so." Subsequently, in *Miller* v. *William Boothman and Sons Ld.* (3), the Court of Appeal decided that, having regard to the language used in ss. 60 and 159 of the Factories Act, 1937, the Woodworking Machinery Regulations, 1922, made under the Factory and Workshop Act, 1901, were not only kept alive, but were capable of modifying the prima facie obligations of s. 14 of the Factories Act, 1937. I do not think that the question here at issue is affected by the decision of the Court of Appeal in *Miller* v. *William Boothman & Sons Ld.* (3). I propose to follow the reasoning of Atkinson J. in *Garcia* v. *Harland and Wolff Ld.* (4) which commends itself to me. No doubt, in that case it was sought to apply the Shipbuilding Regulations, 1931, to a ship in wet dock, but, if the decision of Atkinson J. were not right, the result of these sections would be to make any regulation which had been made under the Factory and Workshop Act, 1901, and which could be brought within the provisions of s. 106 of the Factories Act, 1937, applicable to a ship in a wet dock, even though the regulation purported to be dealing with some different subject-matter altogether. I cannot think that this is what was intended by these subsections.

The third claim put forward on behalf of the plaintiff is based on s. 26, sub-s. 1, of the Factories Act, 1937. I have already indicated that I do not think that there was any breach by the defendants of a provision for safe means of access to the place at which the plaintiff had to work, but, if I am wrong on that, in my opinion, s. 26 does not apply to a ship in a wet dock at all. If it is to do so, it must be because a ship comes within the definition of a factory in s. 151 of the Factories Act, 1937. Nowhere in the Factories Act, 1937, except in s. 106 is there any express provision made with regard to ships in wet dock. It would, indeed, be strange

(3) Ante p. 337.

(4) [1943] K. B. 731.

1944

LOVELL
v.
BLUNDELLS
AND
T. ALBERT
CROMPTON
& CO., LD.

Tucker J.

that such a thing as a ship, about which there is so much legislation should be inferentially included as a "factory" in a definition such as that in s. 151. Secondly, I consider that the enumeration of premises which are to be considered as factories, which includes: "any yard or dry dock . . . . in "which ships or vessels are constructed," goes to show that it was never the intention of the legislature to include a ship in a wet dock or on the high seas. If the contention of the plaintiff were right, I can see no reason why a ship on the high seas should be excluded if some one happened then to be carrying on an operation of repairing some part of it. Nor do I think that the cleaning or repairing of boilers can be said to be work "carried on by way of trade or for purposes "of gain" within the meaning of s. 151, sub-s. 1. All the observations of MacKinnon L.J. in *Wood* v. *London County Council* (1) seem to me to apply with even greater force to the ship in the present case than to the kitchen in that case. The plaintiff's claims therefore under regs. 1 and 11 of the Shipbuilding Regulations, 1931, and s. 26 of the Factories Act, 1937, fail; but he has succeeded in his claim for breach of the employer's obligation at common law to supply him with suitable material. There must be judgment for the plaintiff for 1,500*l*.

Judgment for plaintiff.

Solicitors for plaintiff: *Shaen, Roscoe & Co.*
Solicitors for defendants: *Carpenters.*

C. G. M.

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(1) [1941] 2 K. B. 232.

JEWELOWSKI v. PROPP.

1944

Feb. 7. 8.

Lewis J.

Contract—Duty of plaintiff to minimize damages—Expenditure of money by plaintiff.

The plaintiff was induced by the fraudulent misrepresentations of the defendant to advance 1,000*l*. to a company on a debenture. The company went into liquidation and the plaintiff received on his claim under the debenture 257*l*. 16*s*. 2*d*., a loss of 742*l*. 3*s*. 10*d*. The receiver sold the assets of the company to the plaintiff for 350*l*., and the plaintiff afterwards resold them for 950*l*., making a profit of 600*l*. It was contended that this 600*l*. should be set off against the loss of 742*l*. 3*s*. 10*d*. :—

1944

JEWELOWSKI
v.
PROPP.

Held, that, although it was the plaintiff's duty to minimize the damages, he was under no obligation to spend money for that purpose, and that he was entitled to the whole amount of the loss on his debenture, 742*l*. 3*s*. 10*d*.

ACTION tried by Lewis J.

The plaintiff claimed damages for fraudulent misrepresentation by the defendant, by which, he alleged, he had been induced to advance 1,000*l*. to a company on a debenture. The company went into liquidation, and the plaintiff, on his claim under the debenture, received 257*l*. 16*s*. 2*d*. He now claimed as damages the difference between that sum and 1,000*l*., namely 742*l*. 3*s*. 10*d*. To satisfy claims against the company the receiver sold its assets. The plaintiff bought them for 350*l*. and afterwards re-sold them for 950*l*. and thus made a profit of 600*l*. It was contended that he should take this into account in assessing his damages in the action.

T. F. Davis for the plaintiff. No doubt it is the duty of a plaintiff to minimize damages, but he can be under no obligation to spend money to do so. Such expenditure might result in further loss.

Scott Cairns for the defendant. The net result of the whole transaction is that the plaintiff has only lost 142*l*. 3*s*. 10*d*., and that is all he is entitled to recover. He may not have been bound to expend money, but, in fact, he did so.

LEWIS J., having stated the facts, continued. The duty of a person to minimize his damages is a proposition which is well-known, but the question is whether he must expend money to enable him to do so. For the plaintiff it is contended that for this purpose he must be looked on as an outsider and his profit is not to be taken into consideration just because he had the good fortune and business astuteness to make a good bargain. It is a question of some difficulty and one on which there does not appear to be any authority, but it seems to me that the argument for the plaintiff is right, so that a plaintiff who is claiming damages for fraudulent misrepresentations cannot be called on to spend money to enable him to minimize the damages. It seems to me that such a rule would be going far beyond the rule that a plaintiff must minimize his damages.

1944
JEWELOWSKI
v.
PROPP.
Lewis J.

The only money which the plaintiff got for his 1,000*l.* was 257*l.* 16*s.* 2*d.*, and it does not seem to me that the money he made out of the purchase of the assets should be put against the damages he claims. There must be judgment for the plaintiff for 742*l.* 3*s.* 10*d.*, with costs.

Solicitors for plaintiff: *Bulcraig & Davis.*
Solicitor for defendant: *Albert M. Oppenheim.*

W. L. L. B.

1944
April 18.
Humphreys, Oliver and Stable JJ.

PORT OF LONDON AUTHORITY *v.* ESSEX RIVERS CATCHMENT BOARD.

Rates—Drainage rates—Annual value of hereditament—Determination annually—Notice of determination—Land Drainage Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 44), *s.* 29, *sub-s.* 2.

The Land Drainage Act, 1930, by s. 24, sub-ss. 1, 2, and 3, provides for drainage boards raising money by levying drainage rates from owners and occupiers of hereditaments within their jurisdiction, the rates being assessed on the basis of annual value and made for a period not exceeding twelve months. Section 29, sub-s. 2, provides for the determination by the drainage board of the annual value of any land which is not assessed for the purposes of income tax under sch. A. of the Income Tax Act, 1918, and sub-s. 3 provides that when a drainage board has made a determination of annual value, they shall serve notice of their decision on the owner and occupier of the hereditament to which their decision relates who may, within 28 days after service of the notice, appeal to a court of summary jurisdiction against the determination. A drainage board, having some years previously made a determination of the annual value of certain hereditaments, refused to comply with a request by the owner of the hereditaments to make a fresh determination of the annual value and to serve notice of their decision on him. The board contended that, as they had made one determination of the annual value, they could not in law be compelled to make a fresh determination :—

Held, that the drainage board were required to make a determination of the annual value of hereditaments within their jurisdiction each year and to serve notice of their decision on the owners and occupiers affected as otherwise the owners and occupiers would be deprived of the right of appeal which the statute gave them.

SPECIAL CASE stated under Baines's Act, 1849.

The appellants, the Port of London Authority, were at all material times the owners and occupiers of certain docks, work-

1944

PORT OF LONDON AUTHORITY *v.* ESSEX RIVERS CATCHMENT BOARD.

shops, and premises situate at Tilbury Docks, Essex, within the Rainham internal drainage district administered by the respondents, the Essex Rivers Catchment Board, acting as an internal drainage board, pursuant to the Land Drainage Act, 1930. Provision was made by s. 24, sub-ss. 1, 2 and 3, of the Act for the expenses of a drainage board to be met by drainage rates made by the drainage board on the owners and occupiers of hereditaments in the district of the board. By s. 24, sub-s. 4: "Every rate made by a drainage board shall "be an annual value rate, that is to say, a rate assessed on the "basis of annual value as regards all hereditaments . . ." By s. 26, sub-s. 2: ". . . . every drainage rate shall be made "in respect either of a period of twelve months or a period of "six months, as the drainage board may determine . . . ." By s. 29, sub-s. 1: "In this Part of this Act . . . . The "expression 'annual value' in relation to any land means the "gross annual value of that land as determined for the pur"poses of income tax under sch. A of the Income Tax Act, 1918, "as amended by any subsequent enactment." By sub-s. 2: "Any apportionment of the gross annual value of any land "which may be necessary for the purpose of determining the "annual value of any land for the purposes of drainage rates "shall be made by the drainage board, and, where any land "is not assessed for the purposes of income tax under sch. A "of the Income Tax Act, 1918, as amended by any subsequent "enactment, the annual value thereof for the purposes of drain"age rates shall be such value as may be determined by the "drainage board." By s. 30, sub-s. 1, an occupier or owner of a hereditament in a drainage district who is aggrieved by a drainage rate may appeal against the rate to quarter sessions. No part of the appellants' premises had been assessed for the purposes of income tax under sch. A of the Income Tax Act, 1918, at any material time.

In February, 1937, the respondents determined the annual value of the appellants' premises for the purpose of their assessment to drainage rates as being 51,541*l.* which was based on the net annual value of the premises as previously determined by the Thurrock urban district council for the purposes of the general and district rate under the Rating and Valuation Act, 1925. In November, 1937, a ticket office rented from the appellants by the London and North Eastern Railway Co., and forming part of the premises, was entered on that part of the railway valuation roll which related to that railway company, pursuant to the Railways (Valuation for Rating) Act, 1930. In October, 1939, therefore, the respondents redetermined the annual value of the premises for the purpose of drainage rates in the sum of 51,504*l*. In or about March in every year since 1940, the respondents had made drainage rates under the Act, but they had not made any further determination of the annual value of the appellants' premises since that made in October, 1939. In particular, on March 26, 1943, the respondents made an owner's drainage rate of tenpence in the pound and an occupier's drainage rate of threepence in the pound for the year beginning April 1, 1943, and assessed these rates on the appellants.

Before the making by the respondents of the drainage rates for the year beginning April 1, 1943, the appellants, being of opinion that the annual value of the appellants' premises for the purpose of the rates had become less than the annual value determined by the respondents in October, 1939, requested the respondents to make a fresh determination of the annual value thereof for the purpose of the drainage rates for the year beginning April 1, 1943, before making the same, and to serve notice of their decision on the appellants pursuant to s. 29, sub-s. 3, of the Act, but the respondents refused so to do. The respondents made the rates in question and assessed them on the appellants on the basis of the annual value determined in 1939. On April 21, 1943, the appellants, being aggrieved by the assessment gave notice of appeal against the same to Essex quarter sessions and to the respondents pursuant to s. 30 of the Act on the following grounds: (1.) That, notwithstanding that the appellants' premises were not assessed for the purposes of income tax under sch. A of the Income Tax Act, 1918, the respondents failed to comply with s. 29, sub-s. 1, of the Land Drainage Act, 1930, in that they did not determine the annual value of the premises for the purposes of the rates; (2.) that, if the respondents did determine the annual value of the premises for the purposes of the rates, they failed to comply with s. 29, sub-s. 3, of the Land Drainage Act, 1930, in that they did not serve notice of their decision on the appellants; (3.) that the rates were bad in law. After the notice of appeal had been given the appellants and the respondents agreed to state a special case for the opinion of the High Court: (1.) whether the respondents were bound in law to make a fresh determination of the annual value of the premises and to serve notice of their decision on the appellants before making the drainage rates for the year beginning April 1, 1943; (2.) whether the rates were bad in law.

Harold B. Williams for the respondents. All that the Land Drainage Act, 1930, requires a drainage board to do is on one occasion to make a determination of the annual values of the hereditaments within their jurisdiction. When that determination has been made it is good for all time and the drainage board are not required to make a further determination of an annual value even though the owners or occupiers of a hereditament affected by the drainage rate request that a further determination should be made. The drainage board are not required by the Act to make a fresh determination of values every time they make a rate. An owner or occupier has only a right of appeal when the board have made a determination of an annual value and served notice of their decision on the owner and occupier of the hereditaments affected. As the respondents have not made a fresh determination of the annual values of the appellants' premises the appellants have no right of appeal. The use of the term " annual values " does not import the need of annual determination.

Wishart for the appellants. The contention of the catchment board that when a determination of annual value has once been made it is good for all time is not in accordance with the provisions of the Act. The basis of the rate is on annual value, and that must be determined each year. " Annual value " must be the value of the hereditament for the year in question although it does not follow that the determination must take place in that year. The longest period for which a rate may be made is for a year. The Finance Act, 1930, contains, in s. 27, sub-s. 3, an express provision that the annual value of any property for the purpose of income tax shall be taken as being the annual value of that property for the same purpose for the next year of assessment. That shows that there must be an express provision in a statute to make a determination of annual value stand good for a subsequent year. The determination of values in 1939 was a re-determination as there had been a previous determination of annual values in 1933. There was, therefore, no reason why there should not be a further re-determination of annual values in a subsequent year. The construction of the Act as requiring that a determination of the annual value of properties should be made each year is

1944

PORT OF LONDON AUTHORITY v. ESSEX RIVERS CATCHMENT BOARD.

the only one that works justice as there is only a right of appeal against a determination of annual value. Owners of land assessed under sch. A can appeal against the assessment in any one of the five years for which the valuation lasts, but, if the contention of the respondents was right, the owners of land not assessed under sch. A would be in a worse position, for they could only appeal after a determination by the respondents and notice of their decision which the respondents refuse to make. The Act is a rating Act and ought to be construed contra proferentes, that is, against the rating authority.

Harold B. Williams replied.

HUMPHREYS J. The contention which is made on behalf of the respondents is that all that is required to be done is that in 1931 a drainage board, if it came into existence then, or later if it came into existence later, should determine once and once only the annual values for the purpose of drainage rates of the hereditaments which come under its jurisdiction. It is contended on behalf of the appellants that the annual value of a hereditament must be determined annually because it is the annual value which has to be assessed and not a value which has been determined once and for all. Where, under sub-s. 3 of s. 29, a drainage board have determined any value, they shall serve notice of their decision on the owner and the occupier of the hereditament to which the decision relates. That appears to me to indicate that in regard to every hereditament the duty of the drainage board is to determine either yearly or half-yearly, and normally it would be yearly, the annual value of that hereditament and to give notice of their decision to the owner and occupier thereof. The object of giving notice of their decision is to be found in the following words of s. 29, sub-s. 3 of the Act: "The owner and the occupier, or either of "them, may within twenty-eight days after the service of the "notice, appeal against the apportionment or determination "to a court of summary jurisdiction, whose decision shall be "final." It seems to me that, unless there is an annual determination and that determination is followed each year by a notice thereof served on the persons affected by the determination, there is no opportunity given by the Act to the person who is liable to pay the drainage rate to appeal, as he is entitled to do under the Act. Every person who is affected by a rate of any sort has a right to appeal to some court or other. It does not seem to me that there is any half-way house. Either the respondents are right in saying that they had a discretion in the matter and cannot be compelled to make a fresh determination or they are wrong. If they are wrong, the rate is bad.

Is it bad? I think it is clear that the Act was intended to provide for the annual valuation of such hereditaments as were not already the subject of a valuation under sch. A of the Income Tax Act, 1918. Sub-section 4 of s. 24 provides that "every rate made by a drainage board shall be an annual value "rate, that is to say, a rate assessed on the basis of annual "value," and that every drainage rate shall be made, not for five years or any longer period, but in respect of a period of twelve months at the longest. I do not desire myself to express any opinion on any of the questions which have been argued which, in my view, are unnecessary for the decision of this case. I base my judgment on this. It seems to me to be clear that the argument for the respondents involves this proposition. Every property which is prima facie liable to a drainage rate is either assessed under sch. A of the Income Tax Act, 1918, or it is not. If it comes under sch. A, the assessment is a quinquennial assessment, but the person assessed has an annual right of appeal against the assessment. If he thinks he can show that the annual value of his property as assessed in the preceding year has decreased in the current year so that the present annual value is less than it was in the preceding year, he can appeal to quarter sessions. As regards the position of persons such as the appellants whose property is not assessed under sch. A, the result of the acceptance of the respondents' contention would be that a drainage board, by refusing to accede to a request that they should determine the value of the hereditaments within their jurisdiction for a particular year, could deprive persons who were liable to pay drainage rates of their right to appeal to a court of law. In my opinion, that proposition only requires to be stated to be shown to be wrong. No public authority can have vested in it a discretion to do or not to do something which it may exercise in this way. It would be an impossible position if the respondents were able by declining to make a further valuation to prevent a person from appealing to a court of law, a step which he has an unlimited right to take, according to the terms of the statute, if he is dissatisfied with the decision of the public authority. The language of s. 24 can only be made consistent by reading it as not only giving jurisdiction to

1944

PORT OF LONDON AUTHORITY v. ESSEX RIVERS CATCHMENT BOARD.

Humphreys J.

the drainage board to make a determination of annual values, but as also requiring them to make a determination of annual value each year and then, under sub-s. 3 of s. 29, to give notice of their decision to the owners and occupiers of hereditaments liable to pay drainage rates so that each of those rated persons has the right of appeal which the sub-section gives him. Any other decision must work real injustice, and courts of law are always reluctant to hold that the true meaning of any Act of Parliament is that which works injustice. I do not think it necessary for skilled valuers to be appointed every year to value the whole of the hereditaments which come within the respondents' jurisdiction. It may be sufficient for the respondents, if no new element is brought to their attention, to determine in any particular year that there is no alteration in the existing annual values which are to remain in force, but they must determine those values every year so that the rights of appeal which are given by the statute to the parties affected by the rate, may be exercised. For these reasons I think that both the questions put to us must be answered in the affirmative.

OLIVER J. I agree with every word my Lord has said.

STABLE J. I agree.

Solicitor for appellants: *Hubert Le Mesurier, Solicitor, Port of London Authority.*

Solicitors for respondents: *Kennedy, Ponsonby & Co., for W. Hilliard & Ward, Chelmsford.*

R. F. S.

C. C. A.

1944
April 3.

Viscount Caldecote C.J. Humphreys and Atkinson JJ.

REX *v.* GOODWIN.

Criminal Law—Prevention of crime—Found in place about to commit an offence—Larceny—"Found"—Subsequent arrest—"About to commit"—Evidence—Prevention of Crimes Act, 1871 (34 & 35 *Vict., c.* 112), *ss.* 7, 20.

The appellant was charged on indictment under s. 7 of the Prevention of Crimes Act, 1871, that after two previous convictions, he was found in a public place about to commit an "offence," to wit, larceny. The evidence was that the appellant, after visiting two blocks of flats and examining the locks of doors there, went into the street where he was arrested. By s. 20 of the Act, the expression "crime" means "any felony" or certain named misdemeanors, and "offence" means any act or omission which is not a crime as defined by the Act and is punishable on indictment or summary conviction :—

Held, (1.) that the indictment was not bad on the ground that larceny, being a " crime," was not an " offence " under the Act, since the effect of s. 20 was that the expression " offence " might include a " crime " as well as any act or omission which was not a " crime " but was punishable on indictment or summary conviction ; (2.) that to satisfy s. 7 an accused person need not be arrested at the place where he was " found," which meant no more than " discovered " or " seen " ; *Moran* v. *Jones* (1911) 75 J. P. 411 approved and applied ; but (3.) that there was not sufficient evidence that the appellant was " about to commit " an offence within the meaning of s. 7.

Per curiam : If the facts of a case afford evidence, not only of an offence under s. 7 of the Prevention of Crimes Act, 1871, but also of another offence which does not involve giving proof of the bad character of the accused person, it is more satisfactory that he should be charged with that other offence.

APPEAL against conviction and sentence.

The appellant was convicted on an indictment charging that on November 12, 1940, he was convicted on indictment of a crime, a previous conviction of a crime being then proved against him, and that, within seven years immediately after the expiration of his last sentence, namely, on December 2, 1943, he was found in a public place, to wit, Portsea Hall and Clifton Court in the county of London, in such circumstances as to satisfy the court before whom he was brought that he was about to commit an offence punishable on indictment, to wit, larceny, contrary to s. 7 of the Prevention of Crimes Act, 1871 (1). At the trial the conviction of 1940 and the previous conviction were proved, and evidence was given that, on December 2, 1943, the appellant was seen by police officers to go to a block of flats known as Portsea Hall where he went up to the second floor and examined the locks of two doors. He then left and visited a block of flats some distance away known as Clifton Court, where he again examined locks on doors. Having left Clifton Court and gone into the street, he was arrested shortly afterwards. The appellant was sentenced to imprisonment with hard labour for one year.

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(1) By Prevention of Crimes Act, 1871, s. 7: " Where any " person is convicted on indict- " ment of a crime, and a previous " conviction of a crime is proved " against him, he shall, at any time " within seven years immediately " after the expiration of the " sentence passed on him for the " last of such crimes be guilty " of an offence against this Act, " and be liable to imprisonment, " with or without hard labour, " for a term not exceeding one " year, under the following " circumstances or any of them : " . . . . . Thirdly, if he is found " in any place, whether public or " private, under such circum- " stances as to satisfy the court " before whom he is brought that " he was about to commit or to " aid in the commission of any " offence punishable on indictment " or summary conviction, or was " waiting for an opportunity to " commit or aid in the commission " of any offence punishable on " indictment or summary con- " viction . . . ."

By s. 20: " The expression " ' crime ' means . . . . any " felony " or certain named misdemeanors. " The expression " ' offence ' means any act or " omission which is not a crime " as defined by this Act, and is " punishable on indictment or " summary conviction."

Horace Fenton for the appellant. This indictment was bad on the face of it since it charged that the appellant was found at a place being about to commit an " offence," to wit, larceny. By s. 20 of the Prevention of Crimes Act, 1871, larceny, being a felony, must be regarded as a " crime " for the purposes of the Act, and, therefore, it is not an " offence " within the meaning of the Act. Secondly, by s. 7 an accused person must be " found " at the place where he is about to commit a crime, and that must mean that he is arrested there. Lastly, there was no evidence that the appellant was about to commit a crime.

R. H. Blundell for the Crown. To come within the terms of s. 7 an accused person need not be arrested at the place where he is found about to commit an offence. The section does not so provide, and that construction cannot be placed on the word " found ": see *Moran* v. *Jones* (1) where a Divisional Court held that actual arrest on the premises was not necessary to constitute the offence of being " found " on premises for an unlawful purpose within the meaning of s. 4 of the Vagrancy Act, 1824. There was evidence here to satisfy the court that when the appellant was found at these flats he was about to commit an offence. " Offence " in s. 20 includes any act or omission punishable on indictment or summary conviction whether a " crime " as defined by that Act or not.

Humphreys J. delivered the following judgment of the court: Section 7 of the Prevention of Crimes Act, for an offence under which the appellant was convicted, is one of an unusual character. In most prosecutions on indictment the law requires that a man shall be tried by a jury, without that

(1) (1911) 75 J. P. 411.

jury being informed about his past, unless he desires that they should be so informed and he puts his character in issue ; but on an indictment under s. 7 proof must be given before the jury that the accused has been convicted of two crimes. No point was made at the trial and no point is made on this appeal that the appellant appears by this indictment to have been charged with two offences in one count in as much as it is alleged that he was found at two separate places, in each case, under such circumstances as to satisfy the court before whom he is brought that he was about to commit an offence punishable on indictment, to wit, larceny. Counsel for the appellant has taken three points :—(1.) that the indictment was bad on the face of it ; (2.) that s. 7 requires that, to come within its terms, an accused person must be arrested at the place where he is alleged to have been " found " ; and(3.) that there was no evidence that brought the appellant within the terms of s. 7.

The contention that the indictment is bad on the face of it is based on the fact that it charged the appellant with being about to commit an offence punishable on indictment, to wit, larceny, which is a felony. It is said that by s. 20 of the Prevention of Crimes Act, 1871, felony is not an " offence " within the meaning of that Act. It seems a startling proposition, but there is no doubt that s. 20 does give rise to verbal difficulty. A crime is thereby defined as meaning " any felony " or certain named misdemeanors. The section then continues : " The expression ' offence ' means any act or " omission which is not a crime as defined by this Act, and is " punishable on indictment or summary conviction : " and it is argued that since an offence is defined as something which is not a crime, it does not include any felony, and therefore does not include larceny, with the result that a person who is found about to commit larceny cannot be indicted under s. 7 of the Act. It is odd that from 1871 to the present time this point has never been raised, but, whatever be the possible interpretation of s. 20, in our opinion, it is plain that this Act of Parliament cannot have intended to provide that " offence " did not include larceny when the fact that a person after previous convictions is found in a place in such circumstances as to satisfy the court that he was about to commit an offence punishable on indictment or summary conviction is, by s. 7, made the subject-matter of a charge under the Act. Such a result would be a complete absurdity. It is, perhaps, a sufficient answer to this contention to say that, in our opinion, the effect of s. 20 is that the expression an " offence " may include a "crime " as well as any act or omission which is not a " crime " as defined by the section, but is punishable on indictment or summary conviction. This point, therefore, fails.

The other two contentions for the appellant are more substantial. The second contention is that for the appellant to be brought within the terms of s. 7 he must have been arrested then and there at the place where he is alleged to have been " found " about to commit an offence. We are not inclined to agree that there is any necessity for this court to hold that " found " is equivalent to " arrested." Certainly that is not so in the ordinary use of the English language. It would have been easy for the legislature to have provided, had they wished to do so, that a person who is arrested in the circumstances detailed in the section might be found guilty of an offence, but that is not what is provided by the section and here charged The court is indebted to Mr. Blundell for bringing to their attention the unanimous decision of a Divisional Court in *Moran* v. *Jones* (1). The offence charged in that case was under s. 4, of the Vagrancy Act, 1824, which provides that " every person being found " in or upon any dwelling-house, warehouse, coach-house . . . . " or in any enclosed yard, garden, or area, for any unlawful " purpose " is to be deemed a rogue and vagabond, and the case stated raised the question what was the meaning of the word " found " in that section. Bankes J., with whom Bray J. concurred, said (2) : " In order to be found upon premises " a person must be upon those premises, and the offence, " therefore, consists in being upon premises for an unlawful " purpose and being found there: It is not, in my opinion, " sufficient for a person to be upon the premises for an " unlawful purpose, unless he is also found there. What " constitutes a finding within the meaning of the section ? " The simplest case would be a case of apprehension upon " the premises. Actual apprehension upon the premises, " is, however in my opinion, not necessary to constitute " the offence. I think there may be many cases in which " a person is found upon the premises within the meaning " of the section, although he is not apprehended, until after " he has quitted the premises." That decision has the full approval of this court, and we see no reason why the word "found" should not be given the same meaning in s. 7 of the Act of 1871 and the view of the court is that it means no more than "discovered" or "seen." The second point taken for the appellant fails.

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(1) 75 J. P. 411.

(2) Ibid. 412.

The third point is that there was no evidence that the appellant had brought himself within that part of s. 7 of the Prevention of Crimes Act, 1871, regarding which he was indicted. He was charged with being found in a certain public place in such circumstances as to satisfy the court that he was about to commit an offence punishable on indictment, to wit, larceny. It would not be sufficient to bring the appellant within the terms of the charge that the jury should be satisfied (as they might well be in the case of a person who they already knew had been convicted of two "crimes") that he had it in mind to commit an offence if he had the opportunity. On such a charge as the present, there must be positive evidence that the accused person was then and there about to commit an offence. It may be that there was ample evidence that the appellant was in all probability waiting to commit some such offence as stealing and that he had brought himself within other words in s. 7, namely, "waiting for an opportunity to commit . . . . "an offence punishable on indictment or summary conviction." We express no opinion about that, but that was not the offence with which he was charged. He was charged with the specific offence of being about to commit larceny, first, at Portsea Hall, and then at Clifton Court. It seems to us that the short answer which might have been made on his behalf was that if, when he was found, he was about to commit an offence, why did he not commit it? No-one prevented him. It may be that he had the intention to commit this offence, but in dealing with a charge under this section an intention to commit an offence is not enough. It must be proved that the appellant was "about to commit" an offence. It may be that the appellant's idea was that, if he could find a lock that was suitable, he would come back later and commit an offence, but evidence of that kind will not support this charge under s. 7. There should have been evidence that the appellant was, then and there, at the place where he was found, about to commit the offence of larceny which involved a breaking-in of premises to commit larceny. The provisions of s. 7 are unusual in that they require that the jury shall know that the man whom they are trying has been previously convicted, and is likely, according to what is known of him, to commit the offence with which he is charged. On most charges, the greatest care is taken to keep precisely that fact from the knowledge of the jury. That being so, whenever a charge under s. 7 is brought the judge and everyone else concerned in the case should be meticulously careful to see that the accused person is not convicted except upon clear and unmistakable evidence that he has committed the particular offence charged against him. In our opinion, the evidence here was insufficient to prove that the appellant committed the crime with which he was charged, and on that ground the conviction must be quashed.

The court wish to add that where the facts of a case afford evidence not only of an offence against s. 7 of the Prevention of Crimes Act, 1871, but also of another offence, such as attempted larceny or an offence under s. 4 of the Vagrancy Act, 1824, which does not involve giving proof to the jury of the prisoner's bad character, it is much more satisfactory that the prisoner should be charged with that other offence. Once a jury knows that the prisoner is given to committing a particular class of crime, it is difficult for them, notwithstanding their best endeavours, to treat him in the same fair and impartial way as they would if they knew nothing about his past.

Conviction quashed.

Solicitor for appellant: *Marris & Shepherd.*
Solicitor for Crown: *Solicitor to Metropolitan Police.*

C. G. M.

1944
April 27.

Humphreys, Croom-Johnson and Stable JJ.

BENTS BREWERY COMPANY, LIMITED *v.* UPPER AGBRIGG ASSESSMENT COMMITTEE AND OTHERS.

Rates — Valuation — Amendment — Grounds — "Annual Revision" — Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 37, *sub-ss.* 2, 3—*Appeal by owner of hereditament against assessment to quarter sessions—Locus standi.*

A rating authority made a proposal for the amendment of the valuation list in respect of a hereditament belonging to the appellants by increasing the gross and rateable values. The proposal set out the existing and proposed figures and, in purported compliance with the requirements of s. 37, sub-s. 2 (*b*), of the Rating and Valuation Act, 1925, added as the specification of "the grounds on which the proposed amendment is supported," the words "annual revision." The rating authority sent a copy of the proposal to the occupier of the premises in accordance with s. 37, sub-s. 3, of the Act, which provides that a copy is to be sent to the occupier, or, where there is no occupier, to the owner of the hereditament. In addition, they sent a copy to the appellants. No objection to the proposal was made by the occupier, but an objection was made in writing by the appellants who appeared before the assessment committee without objection, and, on the proposal being allowed, gave notice of appeal to quarter sessions. On a preliminary objection, quarter sessions held that the appellants had no locus standi since they were not persons to whom a notice of the proposal had been transmitted pursuant to s. 37, sub-s. 3, of the Act :—

Held (1.) that, as the objection to the proposal by the appellants and their appearance before the assessment committee were attributable to the invitation of the rating authority in sending them a notice of the proposal, the respondents to the appeal to quarter sessions, the assessment committee and the county valuation committee, could not be heard to say that the assessment committee had no jurisdiction to entertain the objection or that the appellants had no right of appeal from their decision ; (2.) that the words "annual revision" in the proposal did not constitute a ground on which the proposed amendment was supported, but that s. 37, sub-s. 2 (*b*), required that the grounds specified should give the party to be affected by the proposal some indication of the reason why the particular rate was to be altered, and that no such indication was given by the use of the words "annual "revision."

CASE STATED by quarter sessions.

The appellants, Bents Brewery Co., Ld., were the owners of a hereditament known as Clarence Hotel, Greenfield, which was occupied by one Alfred Jenkinson and was assessed in part I. of the valuation list for the rating area of the urban district of Saddleworth at a gross value of 85*l*. and a rateable value of 68*l*. By a proposal, dated September 30, 1942, the second respondents, the rating authority for the urban district of Saddleworth, proposed that the valuation list should be amended by increasing the gross and rateable values of the hereditament to 95*l*. and 76*l*. respectively. A copy of the proposal was transmitted by the rating authority to the occupier of the hereditament, and also, as a matter of courtesy, to the appellants. The proposal set out the existing and proposed gross and rateable values of the hereditament and stated as "the grounds upon which amendment is supported: Annual "revision." The occupier gave no notice of objection to the proposal, but, on February 9, 1943, notice of objection in writing was given to the rating authority by the appellants. On February 11, 1943, the third respondents, the county valuation committee of the West Riding of Yorkshire, gave notice in opposition to the appellants' objection. On February 23, 1943, the proposal and objection were considered by the first respondents, the Upper Agbrigg Assessment Committee, who determined to allow the proposal and amend the valuation list in accordance therewith. The appellants, the rating authority and the valuation committee appeared before the assessment committee, and no objection was raised to the presence of the appellants at the meeting. On March 12, 1943, the appellants gave notice of appeal to quarter sessions, and at the hearing of the appeal the assessment committee and the valuation committee appeared separately as respondents. The rating authority did not appear. On the appeal being called on for hearing, the respondents submitted as a preliminary objection that the appellants had no right of appeal to quarter sessions. It was contended on behalf of the respondents that, the hereditament being in the occupation of an occupier, a copy of the proposal should have been sent to him and not to the appellants, in accordance with the provisions of s. 37, sub-s. 3, of the Rating and Valuation Act, 1925 (1), and that, as the appellants were not persons to whom a copy of the proposal had been transmitted in pursuance of the subsection, the transmission to them of a copy, whether as a matter of courtesy or otherwise, gave them no right under sub-s. 4 to object to the proposal, and, consequently, they were not entitled to appear before the assessment committee or to appeal from its decision. Quarter sessions upheld the objection and dismissed the appeal. In view, however, of the possibility of their decision on the preliminary point being held to be erroneous, quarter sessions, by consent of all parties, heard the appeal on its merits. They were of opinion that the document of September 30, 1942, was not a valid proposal within the meaning of the Act in that it did not specify any ground on which a proposal could be supported, as required by s. 37, sub-s. 2 (*b*), of the Act, and that, consequently, the assessment committee had no jurisdiction to amend the valuation list in accordance with the document. The appellants appealed to the High Court against the decision of quarter sessions on the preliminary point, and the assessment committee and the valuation committee appealed against the second finding of quarter sessions.

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(1) By Rating and Valuation Act, 1925, s. 37, sub-s. 2: "Every "proposal [for the amendment of "the current valuation list] made "under this section must—(*a*) be "made in writing . . . . (*b*) specify "the grounds on which the pro-"posed amendment is supported."

By sub-s. 3: "The rating "authority shall, within seven "days after the date on which "the proposal is made by or "served on them, transmit a copy "thereof, in the case of a proposal "made otherwise than by the "occupier of the hereditament to "which it relates, to the occupier, "or, where there is no occupier, "to the owner thereof . . . ."

The court first heard the appeal of the appellants against the decision of quarter sessions on the preliminary objection.

Comyns Carr K.C. and *Harold B. Williams* for the appellants.

Streatfeild K.C. and *M. Archibald* for the assessment and valuation committees.

The judgment of the court on this point was delivered by CROOM-JOHNSON J. who stated the facts and continued: Quarter sessions sustained a preliminary objection taken by the respondents that the appellants had no locus standi on the appeal because, by the provisions of s. 37, sub-s. 3, of the Rating and Valuation Act, 1925, the proposal should have been transmitted to the occupier of the premises and not to the appellants, and that, as the appellants were not persons to whom the proposal should have been sent, they had no right to object or to appear before the assessment committee. On behalf of the appellants it is said that they were actually served with a notice of the proposal which informed them that, unless they objected to it, the matter would be decided against them. They did object and no one questioned their right to be present at the meeting of the assessment committee or to the competency of the committee to hear them. That being so, the appellants contend that it does not now lie in the mouth of any one who served them with the proposal and gave them the notice to say that they were not lawfully present at the meeting. On the other side, it is said that by sub-s. 8 of s. 37 of the Act, the right of appeal is subject to the express provisions of the section, one of which is that the only case in which a copy of the proposal is to be transmitted to the owners is where there is no occupier, and, unless that procedure is complied with, there is no jurisdiction in anybody to determine anything, and, consequently, nothing which can be appealed against to quarter sessions, and that no waiver before the assessment committee will clothe quarter sessions with jurisdiction to hear the appeal of the appellants.

In our view, in the circumstances of this case, the respondents could not be heard to say at quarter sessions that the state of things which they had brought about by their own invitation deprived the assessment committee of jurisdiction to hear the appellants' objection. The document which was sent to the appellants was one which, we think, this court should hold to be in accordance with the law, at least so far as concerns the persons who sent it. Unless everything in the document was meaningless, it could only have been sent to the appellants on the basis that it was properly drawn up and properly served on the right persons. Furthermore, when the matter came before the assessment committee no one took any objection to the appellants' presence there. It has been said by Mr. Streatfeild that the appellants must be presumed to know the law. It must, therefore, be presumed that the assessment committee, the rating authority and the valuation committee also knew it and none of them raised any objection to the course taken by the appellants. That could only be on the basis that they were indicating to the appellants that they had been rightly brought before the assessment committee as owners of the premises. The appellants had come within the provisions of sub-s. 8 of s. 37 as being persons who had objected to the proposal and had been aggrieved by the decision of the assessment committee. We, therefore, hold that it did not lie in the mouth of the respondents to object at quarter sessions to the consequences of their own act. We come to this conclusion, not as something which lays down any general rule or principle which may be applicable to other cases, but on the facts of this exceptional case. The result is that, in our opinion, quarter sessions came to a wrong decision on this point, and that they should have heard the appellants' appeal on the footing that they were persons who had been lawfully brought before the assessment committee.

The Court then heard the appeal of the assessment and valuation committees on the principal question raised by the case.

Streatfeild K.C. and *M. Archibald* for the assessment and valuation committees. Quarter sessions were wrong in holding that the words " annual revision " were not a sufficient specification of the grounds on which the proposed amendment was supported to satisfy the requirements of s. 37, sub-s. 2 (*b*), of the Act. It was held by the Divisional Court in *Ex parte St. Albans Rubber Co.* (1), on an application for orders of prohibition against an assessment committee, that a proposal to amend a valuation list which set out the present and proposed gross and rateable values of the hereditament and gave as the ground of the proposal the word " re-assessment," was sufficient, and the court refused to grant the application. The word " re-assessment " does not differ in principle from the words " annual revision " which can only mean that a revision has been made and that the figures of the last assessment are now incorrect and so it is proposed that the assessment should be increased. That is a sufficient compliance with the requirements of the section.

Comyns Carr K.C. and *Harold B. Williams* for the appellants. Quarter sessions were right in their decision. It is not permissible to introduce into the consideration of the matter any alleged understanding by the appellants of a special meaning to be attributed to the words " annual revision " as was suggested in the contention of the respondents before quarter sessions. Before that could be allowed there would have to be a finding of fact as to the knowledge of the appellants, and there is no such finding in the case. The words " annual revision " must, therefore, be considered by themselves, and the matter should be regarded apart from the decision in *Ex parte St. Albans Rubber Co.* (1) since, although *Rex.* v. *Thanet and District Assessment Committee* (2) which is an authority directly in the appellants favour, was mentioned to the court, who decided *Ex parte St. Albans Rubber Co.* (1), they had not the report of the case before them. The words " annual revision " which are the only ground on which the proposal in the present case is said to be supported do not state a reason why the assessment is incorrect. They merely refer to an occasion on which it may be discovered that the assessment is so. The phrase " annual revision " is unknown in the Rating and Valuation Act, 1925, which provides for a quinquennial revision for which proposals may be made at any time.

(1) Unrep. Dec. 14, 1942.

(2) [1939] 2 K. B. 640.

STABLE J. In this case I have been asked to deliver my judgment first. The court of quarter sessions having, as we think wrongly, decided that the appellants had no locus standi on the appeal to them, went on to determine the real question at issue between the parties on the hypothesis that they were wrong in their decision on the preliminary objection. On the main question raised by the appeal quarter sessions held that the proposal to alter the rate was bad in law.

The proposal was made in accordance with s. 37 of the Rating and Valuation Act, 1925. Sub-section 2 (*b*) of that section provides that every proposal must be made in writing and "must specify the grounds on which the proposed amendment "is supported." The proposal here was made in writing, the proposed amendment being an increase in the gross value of the hereditament from 85*l*. to 95*l*. and in the rateable value from 68*l*. to 76*l*. With regard to the specification of the grounds on which the proposed amendment was supported, all that the proposal said was "annual revision." In my judgment, "annual revision" is not a specification of the grounds on which a proposed amendment is being supported. If it is anything, it is a statement of the occasion on which the amendment is sought to be made. The section means exactly what it says. It does not mean that the authority putting forward the proposal must set out the evidence on which it relies or state in minute detail the grounds on which the proposed amendment is supported, but, to satisfy the section, the authority must give the party who is to be affected by the proposal some indication of the reason why the suggested change is being sought.

The view of the law which I have expressed is merely to reiterate what has already been stated by this court in *Rex* v. *Thanet and District Assessment Committee* (1). It is true that the major flaw in the proposal complained of in that case was that it did not indicate whether the amendment proposed was to be an increase or a decrease in the valuation, and that fact, perhaps, relegated the second point in the case to a comparatively subordinate position, none the less each member of the court indicated plainly that the requirements of s. 37, sub-s. 2 (*b*), must be complied with. We were referred to the transcript of the shorthand note in *Ex parte St. Albans Rubber Co.* (2) from which it appears that, on an application to this court for leave to move for an order of prohibition, the court came to the conclusion that the word "re-assessment," which was given

(1) [1939] 2 K. B. 640.

(2) Unrep. Dec. 14, 1942.

as being the ground on which the proposed amendment was supported, was sufficient. We have been told that the court on that occasion did not have the advantage of having before them the report of *Rex* v. *Thanet and District Assessment Committee* (1) and moreover there may be, as, indeed, I think there is, a distinction between the words " annual revision," which, so far as I know, mean nothing in the present connexion, and the word " re-assessment." However that may be, both on principle and in accordance with the decision in *Rex* v. *Thanet and District Assessment Committee* (1), I think that the words " annual revision " do not specify a ground on which the proposed amendment can be supported. That being so, the proceeding in this case was defective from the beginning and quarter sessions came to a right decision in hypothetically allowing the appeal.

CROOM-JOHNSON J. I am of the same opinion and for the same reasons. In my view, you do not specify a ground on which a proposal is to be supported merely by saying " because " I say so " or by saying " because this is my annual revision." Such phrases do not seem to be a " specification " within the words of Lord Hewart C.J. in *Rex* v. *Thanet and District Assessment Committee* (1). Speaking for myself, I find it a little difficult to think that the decision of this court in *Ex parte St. Albans Rubber Co.* (2) would necessarily have been the same if *Rex* v. *Thanet and District Assessment Committee* (1) had been cited to them. I agree that the appeal on this point should be dismissed.

HUMPHREYS J. I was a member of the court in each of the two cases which have been cited. All I wish to say is that I think that the decision in *Rex* v. *Thanet and District Assessment Committee* (1) is not only binding on this court but also that it was a correct decision. With regard to the application made in *Ex parte St. Albans Rubber Co.* (2), I am not satisfied that the decision of the court would have been the same if we had had the decision in *Rex* v. *Thanet and District Assessment Committee* (1) before us. However that may be, if it becomes a question of which should prevail, I prefer the decision in the last mentioned case. Looking at the matter apart from authority, I am of opinion that the words " annual revision " do not constitute grounds on which the proposed amendment is

(1) [1939] 2 K. B. 640.

(2) Unrep. Dec. 14, 1942.

1944

BENTS BREWERY CO., LD. v. UPPER AGBRIGG ASSESSMENT COMMITTEE.

supported within the meaning of s. 37, sub-s. 2 (*b*), of the Rating and Valuation Act, 1925. The result of the judgment of the court will be that the appeal of the appellants will be allowed and that of the respondents dismissed.

Solicitors for the appellants: *Godden, Holme & Ward, for Edwin Berry & Co., Liverpool.*

Solicitors for the respondents: *Warwick Williams & Marchant, for Bernard Kenyon, Wakefield.*

P. B. D.

1944

April 24.

Hallett J.

Ex parte BLYTH.

Appeal—Divisional court—Quarter sessions—Case stated—Bail—Application to judge in chambers for bail pending appeal—Jurisdiction to grant.

A judge of the King's Bench Division has no inherent jurisdiction to grant bail to a convicted person.

SUMMONS adjourned into court.

The applicant, Wilfrid Percival Blyth, was convicted by a court of summary jurisdiction of offences under the Consumer Rationing Order, 1941, and was sentenced to twelve months' imprisonment and to pay a fine. On May 27, 1942, he appealed to quarter sessions against the conviction and sentence, and the appeal was dismissed. On November 16, 1942, he was brought before quarter sessions to show cause why he should not be committed to prison for non-payment of the fine, and the court imposed on him a sentence of twelve months' imprisonment in addition to the original sentence. He then applied to quarter sessions to state a case, and on April 13, 1943, the application having been acceded to, he entered into the necessary recognizances to prosecute the appeal. On April 17, 1943, he issued a summons applying for bail which was heard in chambers by Hallett J. and adjourned by him into court for judgment.

Mr. A. H. Bryant, solicitor for the applicant.

Valentine Holmes for the prosecutor on behalf of the Board of Trade.

HALLETT J. This is an application for bail made to me in chambers on behalf of one Wilfrid Percival Blyth. Ordinarily, the jurisdiction of a judge in chambers to grant such an application is not in dispute and the sole question is whether, in the exercise of his discretion and on the particular facts, he ought to grant or refuse it. In the present case, however, Mr. Valentine Holmes, who appeared on behalf of the prosecutor, submitted that I had no jurisdiction to grant bail to the present applicant, and said that if, in analogous cases, the Divisional Court or a judge of the King's Bench Division had granted bail, it had been because the jurisdiction to do so had not been the subject of any challenge nor, consequently, of any investigation. It was conceded that the absence of jurisdiction in this and analogous cases might be regarded as an anomaly, and it was urged that it was desirable from the practical point of view that the matter should be the subject of a reported decision so that it might receive consideration in the proper quarters. On the ground that the point involved was one of practical and general importance I was invited to give my decision in open court for the assistance of anyone who might have to consider the question hereafter. The applicant's solicitor had no objection to that course being adopted, and I, therefore, adjourned the application into court, a practice which, I believe, is followed in the Chancery and Probate, Divorce and Admiralty Divisions, but is unusual in the King's Bench Division.

It was contended by the applicant's solicitor that I have an inherent jurisdiction as judge in chambers to grant bail to the applicant pending the determination of his appeal by way of case stated. On the other side, it is argued that I have no such jurisdiction. In the first place, a clear distinction must be drawn between granting bail before conviction and granting it after conviction. In Chitty's Treatise on the Criminal Law, 2nd ed., 1826, vol. 1, p. 93, the learned author says: "by the "ancient common law, all felonies were bailable, till murder was "excepted by statute; so that persons might be admitted to "bail before conviction in almost every case." By the Statute of Westminster (3 Edw. 1, c. 15), the power of justices of the peace to grant bail in certain cases was removed. That statute has now been repealed by the Sheriffs Act, 1887, s. 39, but even before it was repealed—I read from Chitty, p. 97: "The court of King's Bench, or any judge thereof, in vacation, "not being restrained or affected by the statute 3 Edw. 1

"c. 15, in the plenitude of that power which they enjoy at "common law, may, in their discretion, admit persons to "bail in all cases whatsoever, though committed by justices "of the peace or others, for crimes in which inferior jurisdictions "would not venture to interfere, and the only exception to "their discretionary authority is, where the commitment is "for a contempt, or in execution." I draw attention to the exception there "where the commitment is in execution" because it emphasizes the distinction to which I have referred. At p. 93, Chitty says: "With respect to the cases in which bail "is allowable, it is observable that at common law no justice, "or indeed any court, could bail a person in execution on "a judgment or conviction for any offence." The same distinction seems to be recognized in the Habeas Corpus Act, 1679 (31 Car. 2, c. 2), where, in s. 3, one finds these words: "and, if any person or persons shall be or stand committed "or detained as aforesaid" with certain exceptions, "it shall "and may be lawful to and for the person or persons so com- "mitted or detained (other than persons convict or in execution "by legal process)," to apply for bail. So that once more the exception is recognized—"other than persons convict or in "execution." There are other authorities which seem to me to point in the same direction.

In *Anonymous* (*Case No.* 55) (1), the following appears: "A man brought to this court by *habeas corpus*, upon a com- "mitment by the justices of the peace who have cognizance "of the cause, is not bailable until the order is quashed; "because until then he is in execution." In *Rex* v. *Brooke and others* (2), Buller J. said: "It is said that it is strange that "the party should suffer the punishment while the appeal is "pending: but we are to consider it like the case put at the "bar of a writ of error, which does not suspend the execution "of a judgment which it is brought to reverse. It would be "absurd to put a contrary construction upon this act of "parliament," [Justices Commitment Act, 1743], "for if the "appeal were to put an end to the imprisonment by entitling "the party to be bailed, the consequence would be that, "although the conviction were affirmed, the party would "escape from punishment and laugh at justice; for the im- "prisonment is to run from the time of the conviction; and "here the parties having been sentenced to be imprisoned for "fourteen days, the time would be expired before the appeal

(1) (1705) 11 Mod. R. 45.

(2) (1788) 2 T. R. 190, 196.

"was determined." In a much later case, *Kendall* v. *Wilkinson* (1), Lord Campbell C.J. said: "There is no "universal judicial maxim or rule that an appeal or writ of "error is a stay of execution pending the appeal or writ of "error. In our courts of equity, an appeal is no stay of "execution without a special order for that purpose, as has "been lately authoritatively declared, in the case of *Hope* v. "*Hope* (2) by the present Lord Chancellor, for the information "of the tribunals of France. According to the common law "of England, a writ of error, even when allowed and returnable, is no supersedeas of execution in criminal cases. "Where there has been sentence of imprisonment, if the party "was in prison under his sentence when the writ of error was "sued out, he continued in prison pending the writ of error: "and, if he was not, he might still be taken and imprisoned "pending the writ of error. Some statutes giving an appeal "against summary convictions stay execution pending the "appeal: but the statute which gives the appeal in the present "case," [Poor Law Amendment Act, 1844], "has no enactment to this effect; and (as was pointed out by my brother "Erle during the argument) the forms adapted to it rather "indicate a contrary intention." The learned Chief Justice then goes on to discuss what might be the result if the appeal there had the effect of working a stay of execution. In *Ex parte Lees* (3) a similar opinion is expressed as regards release pending the writ of error.

Lastly, as regards authority, I desire to refer to *Reg.* v. *Willmott* (4). There Crompton J. said: "Then, however, "comes the further question, suppose an appeal is given, "can we discharge the prisoner? The late cases are very "clear that, although an appeal against a conviction is given "by statute, it does not in general suspend the effect of the "warrant of commitment; for that we need only look to "*Kendall* v. *Wilkinson* (1). No doubt it is a great hardship "on a party that the law should be so, especially where his "liberty depends on the construction of a statute drawn as "this is." [Embezzlement of Public Stores Act (39 & 40, Geo. 3, c. 89.] The last few words refer to the fact that the court was of opinion that it was an extremely badly drawn Act of Parliament. The learned Chief Justice had already made some criticisms about the drafting. Blackburn J. said: " But " there is great difficulty in construing s. 21. I am inclined " to think that its effect is to give an appeal in all cases; but, " even if that be so, an appeal has not in general the effect of " suspending the sentence; at all events there is nothing in " this statute which gives it that effect. According to " *Kendall* v. *Wilkinson* (1) it is a question of great general " importance whether Stat. 11 & 12, Vict. c. 43," [Summary Jurisdiction Act, 1848], " gives such effect to an appeal; and " if I thought that that statute applied I should like to take " further time for consideration. But here the conviction is " not before a justice of the peace but before a superin- " tendant . . . ."

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(1) (1855) 4 E. & B. 680, 688.

(2) (1854) 4 De. G. M. & G. 328, 355.

(3) (1858) E. B. & E. 828, 836.

(4) (1861) 1 B. & S. 27, 39, 40.

I ought perhaps to add that the applicant's solicitor relied strongly on *Reg.* v. *Spilsbury* (2). On an examination of that case, however, it is clear that the application for bail which was there made as an alternative to certain other applications was not made after conviction. The application for bail was not granted, but, in any event, the case seems to me to be entirely in accordance with the distinction which I have drawn between the granting of bail to persons before conviction and the granting of it after conviction. If the position as described in the cases to which I have referred is correct, it would appear that one of two results may follow. On the one hand, if bail is not granted pending an appeal and the appeal succeeds, an innocent man may have served the whole sentence by the time the conviction is quashed. On the other hand, if bail is granted pending an appeal and the appeal fails, a guilty man may have escaped his whole sentence by the time the conviction is affirmed.

The legislature has not been blind to that position and has dealt with it in a series of statutory provisions. I was referred to s. 25 of the Bread Act, 1836, s. 110 of the Larceny Act, 1861, and s. 99 of the Public Health Act, 1875, which contain provisions suspending the operation of an order pending an appeal, but I regard as very much more important the general provisions to the same effect which are to be found in four statutes to which I will refer. In s. 1 of the Crown Cases Act, 1848, there is a provision enabling the court of trial " to respite " execution of the judgment on such conviction, or postpone the " judgment until such question "—that is, the question reserved for the Court of Crown Cases Reserved—" shall have been

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(1) 4 E. & B. 680.

(2) [1898] 2 Q. B. 615.

"considered" and in either case to commit the person convicted to prison or admit him to bail. The next statute is the Summary Jurisdiction Act, 1857, which deals with the stating of cases by petty sessions, and s. 3, after laying down the procedure, provides: "and the appellant, if then in custody, "shall be liberated upon the recognizance being further "conditioned for his appearance before the same justice or "justices, or, if that is impracticable, before some other justice "or justices exercising the same jurisdiction who shall be then "sitting, within ten days after the judgment of the superior "court shall have been given, to abide such judgment, unless "the determination appealed against be reversed." It will be seen that there is an express provision for granting bail pending the appeal, and for ensuring that, if the appeal should be unsuccessful, the appellant will not be benefited by obtaining any remission of his sentence merely as the result of having made an unsuccessful appeal. By s. 31, sub-s. 1 (iv.), of the Summary Jurisdiction Act, 1879, as re-enacted with some amendments by the Summary Jurisdiction (Appeals) Act, 1933, s. 1, it is provided: "where the appellant is in custody, the "court who fix the recognizance to be entered into, or the other "security to be given . . . . or any other court of Summary "Jurisdiction acting for the same petty sessional division or "place, may, if they think fit, release him from custody on his "complying with the provisions of the preceding para- "graph . . . ." Lastly, it is provided by the Criminal Appeal Act, 1907, that, when an appeal to the Court of Criminal Appeal is pending, the court, acting sometimes, as provided by s. 17, by a single judge, may grant bail. By s. 14, sub-s. 3, "The time during which an appellant, pending the determina- "tion of his appeal, is admitted to bail, and subject to any "directions which the Court of Criminal Appeal may give to "the contrary on any appeal, the time during which the "appellant, if in custody, is specially treated as an appellant "under this section, shall not count as part of any term of "imprisonment or penal servitude under his sentence." The practice of the Court of Criminal Appeal in regard to this matter is well known, namely, that, if the appellants' appeal comes on without any extraordinary delay, as a general rule the time between the conviction and the hearing of the appeal is not allowed to count towards sentence in the case of an unsuccessful appeal even though the appellant has been detained in custody, and, of course, when he has been on bail, that time is never allowed to count if the appeal subsequently fails. It may be added that sub-s. 4 of s. 14 of the Criminal Appeal Act, 1907, renders the same provision applicable if the old procedure by the reservation of a case is followed.

The legislature has, therefore, made at least four general provisions regarding the granting of bail pending an appeal, but, whether by inadvertence or not, no similar provision appears to have been made in respect of appeals by way of case stated by the appeal committee of quarter sessions. Such appeals are now regulated by s. 20 of the Criminal Justice Act, 1925, which contains no provision corresponding to that which is to be found in s. 3 of the Summary Jurisdiction Act, 1857, or s. 31 of the Summary Jurisdiction Act, 1879. Accordingly, it appears that there is no statutory provision authorizing the justices or any court to grant bail to an appellant pending the determination of his appeal by way of case stated by quarter sessions.

It has been pointed out to me, however, that bail has occasionally been granted, either by a Divisional Court or by a judge of the King's Bench Division, to an applicant to the Divisional Court for certiorari. The matter is dealt with in Short & Mellor's Practice of the Crown Office, 2nd ed., p. 58, where the following statement appears: " When a defendant " is in custody on a conviction, this recognizance does not " operate to release him pending the proceedings in the superior " court; but there are instances in which the court or a judge " on granting the writ of certiorari have so admitted prisoners " to bail upon the authority of *Rex* v. *Reader* (1), that if the " conviction were affirmed they could recommit the prisoners " to undergo the residue of the sentence; but strong doubts " have been cast on the expediency of this practice, because " should the natural term of the sentence expire pending the " proceedings in this court, and the prisoner be not rendered " in accordance with the recognizance upon the affirmance of " the conviction, it would seem that there is no process by " which he could be taken and recommitted, and the only " punishment that could follow would be the estreating of the " recognizance; moreover, there is authority for saying that a " defendant in execution of a sentence is not bailable, and there " is no rule or maxim of law that an appeal is of itself a stay of " execution. Where it is intended that it should be so, the " legislature has thought it necessary to provide for it by Act

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(1) (1781) 1 Str. 531.

"of Parliament, as, for instance, upon writs of error upon "indictments for misdemeanor; see 16 & 17 Vict., c. 32, "s. 4, 6 (now repealed); and upon a case stated for the opinion "of the King's Bench; see 20 & 21 Vict., c. 43, s. 3. In a "case which occurred before Erle J., where a defendant under "such circumstances failed to surrender himself, that learned "judge stated that he would never again discharge a defendant "out of custody pending an appeal by certiorari to this "court."

None the less, it appears that on occasion bail has been granted when an order nisi for certiorari has been obtained, and I have been able to obtain some information about two modern instances where this has been done. I am told that according to a note in the records of the Crown Office in April, 1938, Charles J., after consultation with the Lord Hewart C.J., granted bail on an order nisi. I can say nothing more about the facts of that case except that the sentence is said to have been one of four months' imprisonment for poaching. I have, however, information about a more recent case. On May 29, 1942, a man named Sinnott was ordered by the stipendiary magistrate at Bow Street police court to pay a certain fine forthwith or in default to be imprisoned for six months. On July 24, 1942, a Divisional Court gave him leave to move for certiorari to quash the order and then granted him bail. The application was, of course, made ex parte, and so far as I can ascertain (and, indeed, it seems obvious), there was no argument, and, consequently, no investigation, as to the jurisdiction of the court to grant bail. On July 25, 1942, the applicant was bailed, the condition of the recognizance being that he should prosecute his appeal to the Divisional Court with due diligence and should appear on the hearing of the appeal. On May 4, 1943 (and the date is worth noticing because it was nearly a year after the order that the appellant should be imprisoned for six months) the motion came on for argument before the Divisional Court, which decided that there was no substance in the point taken and the motion was dismissed with costs. Thereupon, as I understand, application was made to the magistrate that the applicant should be committed or re-committed to prison. The magistrate consulted persons who were well qualified to advise him and came to the conclusion that he had no power to commit or re-commit the applicant. The position came to the notice of Humphreys J. who investigated it and has been good enough to place the result at my disposal. I should, however, make it plain that the question of jurisdiction to grant bail was not raised and was not considered by Humphreys, J., so that I have not been able to profit by his views on that question. The question with which he was concerned was whether, if bail were granted and the period of the sentence had expired by the time the appeal had been dismissed, the granting of bail had the wholly unintended and, one would think, undesirable effect, of cancelling the sentence which, as events proved, had been rightly imposed. I understand that Humphreys J. came to the conclusion that such a cancellation was produced, and that, accordingly, the law on the matter required some consideration.

It was not suggested by Mr. Holmes that for the present purpose there was any distinction between the power of the Divisional Court to grant bail and the power of a single judge in chambers to do so, nor did he suggest that there was any distinction in principle between a Divisional Court granting bail pending the hearing of an application for certiorari and a judge in chambers granting bail pending the hearing of an appeal by way of case stated, though obviously the present case is not entirely on all fours with the cases in which the Divisional Court has granted bail pending the hearing of the application for certiorari. Accordingly, if after investigation, I felt that a practice had been established in the Divisional Court to grant bail on applications for certiorari, it might be that I should find that such a practice was binding on me in the present case, the more so because the jurisdiction of judges of this Division to grant bail is obviously of the greatest possible importance and it would be wrong for any judge readily to part with any portion of that jurisdiction or countenance any attempt to whittle it away. So far as I can ascertain, however, there has been no uniform practice either in the Divisional Court or in chambers.

Having considered the matter as best I can with the assistance of able arguments on both sides, it seems to me that there is no foundation for the contention that a judge of the King's Bench Division has an inherent jurisdiction to grant bail to convicted persons. Where that jurisdiction exists it has been given by statutory provisions to some of which I have referred. The fact that the jurisdiction is not given in the case of appeals by way of case stated by quarter sessions may be an oversight, but it is none the less a fact. It is, in my opinion, a matter for consideration by the appropriate authorities whether,

1944

Ex parte BLYTH.

Hallett J.

having regard to the statutory provisions to which I have called attention, some alteration is not now desirable so that on an appeal from an appeal committee of quarter sessions by way of case stated bail may be granted in a proper case without producing the undesirable consequences which I have already mentioned if the appeal fails. I should, perhaps, add that, having regard to the usual practice of the Court of Criminal Appeal with regard to granting bail and also to the fact that the granting of bail in the present instance would almost certainly have the effect of cancelling the whole, or almost the whole, of the remainder of the sentence imposed on the applicant even if his appeal should fail, I doubt very much whether I should have thought it right to give him bail had I considered that I had jurisdiction to do so. I have however, come to the conclusion that I have no jurisdiction to grant this application and so I refuse it.

Application dismissed.

Solicitors for applicant: *John T. Lewis & Woods, for A. H. Bryant, Blackpool.*

Solicitors for respondent: *Solicitor to Board of Trade.*

P. B. D.

SOUTHGATE BOROUGH COUNCIL *v.* WATSON.

C. A.

1944

May 10.

Scott, MacKinnon and Luxmoore L.JJ.

Emergency legislation—Requisition—House—Accommodation for refugees from enemy action—Power of local authority to create tenancy.

A competent authority who has requisitioned a house under reg. 51 of the Defence (General) Regulations, 1939, under powers delegated by the Minister of Health, has no power to create a tenancy with regard to that house, and the person who has been let into possession of the requisitioned house because he has been rendered homeless by enemy action and has been required to pay rent for that accommodation is not thereby made a tenant thereof so as to enable him to claim the protection of the Rent Restrictions Acts.

APPEAL from Edmonton county court.

The Minister of Health, in accordance with the provisions of Circular No. 1949, dated January 18, 1940, and No. 2082, dated July 21, 1940, delegated to the clerk of the Southgate borough council all his functions with regard to the requisitioning of premises within the borough of Southgate for the housing of persons rendered homeless by enemy action. The exercise of the powers thus delegated was subject to certain restrictions set out in the circulars. In particular, the period of occupation of the building requisitioned was not to extend beyond the period indicated to the clerk by the senior regional officer when consent was given to the requisition, and the requisition was subject to the right of the minister at any time to direct the authority to hand over the premises to the person otherwise entitled to possession. Further, premises were not to be retained for any longer period than was necessary. Pursuant to that delegation, in November, 1940, the clerk of the council requisitioned the premises, 62 Ulleswater Road, Southgate, the owner of which had gone away owing to the raids. The Minister of Health confirmed the requisition, and had extended the requisitioning from time to time. The rateable value of the house was such as to bring it within the Rent Restrictions Acts. The defendant, Stanley James Watson, who was a builder and had carried on his business from his residence, had lived at 20 Tottenhall Road, Southgate, and on March 15, 1941, he was rendered homeless by enemy action. On March 24, 1941, the defendant, by the permission of the plaintiffs, entered into occupation of 62 Ulleswater Road. On April 1, 1941, the borough treasurer wrote to the defendant: " As you have occupied the premises situate " at 62 Ulleswater Road, N.14, I have to inform you that you " are required to pay a reasonable rent for this accommodation " . . . ." On April 16, 1941, the borough treasurer wrote to the defendant: " My enquiries and acknowledgment of the " 8th inst. relate entirely to the rent which you will be asked " to pay for your accommodation in the above house." On April 21, 1941, the borough treasurer wrote to the defendant: " I have to inform you that the council have fixed a rent of " 16*s*. 6*d*. per week for your accommodation at the address " below." On January 16, 1942, the borough treasurer wrote to the defendant: " I find from my records that you have not " returned the agreement for the tenancy of the premises " named below." On October 22, 1942, the clerk of the council gave the defendant notice to quit and give up possession on November 30, as the house was required by the owner thereof for her own occupation. The defendant failed to give up possession and the borough council took proceedings in the county court to obtain an order for possession of the premises. In the county court the defendant claimed the protection of the

C. A.
1944

SOUTHGATE BOROUGH COUNCIL v. WATSON.

Rent Restrictions Acts, alleging that it ought to be inferred from the use of the word "rent" in the correspondence that it was the intention of the parties that a tenancy should be created, and that there was a tenancy by estoppel, it being within the power of the council to grant a tenancy. The county court judge held that the council were in possession only by virtue of the powers granted to them by the Minister of Health, within the meaning of reg. 51 of the Defence (General) Regulations, 1939. Under that regulation the powers of the minister were virtually unlimited, but it seemed to him that not all those powers had been delegated to the council whose authority appeared to be limited to providing temporary accommodation for refugees from enemy action by billeting or measures of a similar character, and whose power to requisition private property must be taken to be exercised in such a way as to achieve those purposes. Moreover, their possession of the premises might be terminated at any moment by an order of the minister. He held that the council's position in relation to requisitioned houses was not, in any event, such as to justify them in creating a tenancy; that he ought not to infer from incautious expressions used by subordinate officials in the course of correspondence that it was the council's intention to create a tenancy; and that the correct inference from all the evidence was that the defendant was a licensee under a licence which had been properly determined. Accordingly, he made an order for possession. The defendant appealed.

Fortune and *Henry Harris* for the defendant. The defendant was the legal tenant of the house of which he had been put into possession by the plaintiff council, and, therefore, he was entitled to the protection of the Rent Restrictions Acts. He was not a mere licensee. There was a contractual letting of the house by the plaintiffs to the defendant and the plaintiffs fixed the weekly rent payable by the defendant at 16*s.* 6*d.* a week. This was clearly stated in the correspondence. Some time after the defendant had entered into possession of the premises they sent a tenancy agreement for him to sign, but as this agreement, which was known as the "homeless agreement," contained a term under which he could be turned out at any time after receiving seven days' notice, he refused to sign it. That, however, did not take away the right which he had already acquired to the protection afforded by the Rent Restrictions Acts. A weekly tenancy was created by the entry

C. A.

1944

SOUTHGATE BOROUGH COUNCIL v. WATSON.

of the defendant into possession of the premises and the payment by him of rent. Under reg. 51 of the Defence (General) Regulations, 1939, the competent authority has the widest authority to do anything with the property which they have requisitioned except to sell it. The competent authority has power to enter into a tenancy agreement with the person who has been put in possession of the requisitioned house so as to enable him to claim the protection of the Rent Restrictions Acts. A tenant at will is entitled to the protection of those Acts: *Francis Jackson Developments, Ld.* v. *Stemp* (1).

Roland Burrows K.C. and *Done* for the plaintiffs were not called on to argue.

SCOTT L.J. The question in this case is whether the competent authority who requisitioned the house had power under the Defence Regulations to create a tenancy, turning himself into a landlord and turning into a tenant the person who was put into possession of the house because he had lost possession of his own house by enemy action. The county court judge gave a simple, short and entirely sound judgment in which he held that no tenancy had been created. I think that right. The defence put forward by the defendant to the claim for possession of the house is that, the house being within the Rent and Mortgage Interest (Restrictions) Act, 1939, he, as a person accommodated by the competent authority in these requisitioned premises and paying rent therefor, thereby became a tenant of the premises within the meaning of the Rent Restrictions Acts, so that he acquired the right to remain in the house. It would have been a great injustice to the owner of the premises if effect had to be given to that contention, but that is neither here nor there. It is clear that no tenancy was created by the action of the competent authority, and that that defence, the only defence put forward, entirely fails. The appeal must, therefore, be dismissed.

MACKINNON L.J. I agree.

LUXMOORE L.J. I also agree.

Appeal dismissed.

Solicitors for plaintiffs: *Sharpe, Pritchard & Co.*
Solicitor for defendant: *Joseph Mayorcas.*

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(1) [1943] 2 All E. R. 601.

R. F. S.

C. A.

1944

Mar. 7, 8, 9; *April* 4.

Lord Greene M.R. MacKinnon and Luxmoore L.JJ

MAURAY *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Sur-tax—Settlement—Settlement of part of income for benefit of infant daughter—Contingencies in which daughter's interest for less than life—Claim to treat income as settlor's income—Finance Act, 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 20, *sub-s.* (1) (*c*).

When, under the trusts of a settlement, the infant daughter of the settlor is during the years for which the settlor is assessed to sur-tax, entitled to the income of one-third of the settled fund for life, the existence of special powers of appointment and other contingencies under which the daughter might thereafter cease to be entitled to that income for her life does not cause her income in the years of assessment to be deemed the income of the settlor under the Finance Act, 1922, s. 20, sub-s. 1 (*c*), as being income "payable to or applicable for" her benefit "for some period "less than" her life.

Watson's Trustees v. *Wiggins* [1934] A. C. 264 applied. Dictum of Romer LJ. in the same case in the Court of Appeal [1933] 1 K. B. 245, 258 disapproved.

Appeal from Macnaghten J.

By a settlement made by the settlor, Maurice Mauray, and dated August 5, 1932, properties were settled upon trust for the trustees to accumulate and capitalize the first year's income and thereafter to hold two-thirds of the annual income upon protective trusts for the settlor's wife during her life and the remaining one-third of the annual income (the subject of the dispute in this case) upon protective trusts during the wife's life for the benefit of such of the settlor's children as he should appoint and "until "and subject to" any such appointment for the benefit of his daughter, Joan, on her attaining the age of twenty-one or marrying under that age with consent as therein mentioned. From and after the death of the settlor's wife the entire trust properties were to be held in trust for such one or more of the children or remoter issue of the settlor as he should appoint, and in default of and subject to any such appointment in trust for all or any the children of the settlor living at his death and the issue then living of any deceased child attaining twenty-one or marrying in equal shares per stirpes. Power was given to the trustees to raise out of the accumulated income (other than that of the first year's income) money for the education and advancement of any child of the settlor. Joan, who was the only child of the settlor, was born on March 18, 1923, and during the years 1938/9 and 1939/40 was an infant and unmarried. The settlor's wife was alive during those years, and no appointment had been made by the settlor under the settlement. At a meeting of the Special Commissioners of Income Tax held on January 26, 1942, the settlor appealed against assessments to sur-tax made upon him for 1938/9 and 1939/40, the question being whether the one-third of the income arising under the settlement must be deemed to be the settlor's income by virtue of s. 20, sub-s. 1 (*c*), of the Finance Act, 1922 (1). No question arose as to the other two-thirds. The Commissioners held that s. 20 applied. On appeal Macnaghten J. said it was contended that there was a contingency in which the daughter, Joan, would receive less than one-third of the income, namely, if there were to be at least four children of the settler, including Joan, alive at his death. He did not think that that possibility made the one-third of the income applicable for the benefit of Joan for less than her life within the meaning of s. 20, sub-s. 1 (*c*), and he allowed the appeal. The Crown appealed to the Court of Appeal.

Sir David Maxwell Fyfe S.-G., J. H. Stamp and *R. P. Hills* for the Crown. It cannot be said that the settlor's daughter, Joan, is entitled to one-third of the income of the settled fund during her life. Both during the mother's life and after her death, Joan, if still an infant, would have no right to the income apart from the statutory provisions for an infant's benefit in s. 31 of the Trustee Act, 1925. Further, both during the wife's life and after her death in his lifetime the settlor reserved powers of appointment that would have enabled him, if another child were born, to transfer the benefit of the income to that child, and, even if those powers were not exercised, the settled fund would, if there were four or more children, go amongst them after the wife's death, and Joan's interest would be cut down to less than a third of the fund. In these circumstances it cannot be said that the settlement for the daughter was necessarily for her life, and so, under the Finance Act, 1922, s. 20, sub-s. 1, the one-third share of the income of the settled fund must be treated as income of the settlor for purposes of income tax, including sur-tax: see *Levitt* v. *Inland Revenue Commissioners* (1), and also the reasoning of Romer L.J. in *Watson's Trustees* v. *Wiggins* (2) which was followed by Lord Buckmaster in the House of Lords (3).

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(1) By Finance Act, 1922, s. 20, sub-s. 1: "Any income . . . . "(*c*) which by virtue or in consequence of any disposition "made, directly or indirectly, by "any person after April 5, 1914, "is payable to or applicable for "the benefit of a child of that "person for some period less than "the life of the child; shall, "subject to the provisions of this "section, but in cases under the "above paragraph (*c*) only if and "so long as the child is an infant "and unmarried, be deemed for "the purposes of the enactments "relating to income tax (in"cluding super-tax) to be the "income . . . . of the person, if "living by whom the disposition "was made . . . . and not to be "for those purposes the income of "any other person."

Scrimgeour for the settlor. What matters is the nature of the daughter's interest under the settlement in the years of assessment and the inquiry must not be extended to matters which may possibly defeat that interest in the future. That is established by *Watson's Trustees* v. *Wiggins* (2). The possible exercise of a power of appointment is something which arises aliunde. On its true construction the section is dealing with temporary alienations, and has no application in the case of a settlor who has reserved no interest under the disposition. A limitation of income to a person until the happening of some event is not a limitation for some period less than life, and the distinction drawn by Romer L.J. in *Watson's Trustees* v. *Wiggins* (2) is wrong. A limitation to a woman "during widow-"hood or until she remarries," is a life estate. So, in the present case, "until" is not used as defining the terminus ad quem and has no effect on the period for which income is payable for the benefit of Joan.

Sir David Maxwell Fyfe S.-G., replied.

Cur. adv. vult.

April 4. The judgment of LORD GREENE M.R., and LUXMOORE L.J. was read by

LORD GREENE M.R., who, after reading s. 20, sub-s. 1 (*c*) of the Act of 1922 and stating the facts, continued: To complete the picture as to the applicability of income it is necessary to refer to the provisions of s. 31 of the Trustee Act, 1925. It is not disputed that income applicable for the benefit of a child by virtue of those provisions is to be treated as so applicable "by virtue or in consequence of" the disposition contained in the settlement for the purposes of s. 20, sub-s. 1, of the Finance Act, 1922. The effect of s. 31 of the Trustee

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(1) (1932) 17 Tax Cas. 719.
(2) [1933] 1 K. B. 245, 258.
(3) [1934] A. C. 264, 270.

C. A.

1944

MAURAY
v.
INLAND
REVENUE
COMMISSIONERS.

Lord Greene
M.R.

Act, 1925, is that, so long as Joan remains the only child, the one-third of the income of the fund during the life of the wife is applicable for her benefit until she attains twenty-one or marries with the necessary consent. As soon as she attains twenty-one or so marries, the income is payable to her under the terms of the settlement itself during the life of the wife. If another child is born and the settlor exercises his power of appointment so as to give (let us suppose) one-half of this income to Joan and one-half to the other child thereafter one-half of the one-third of the income will be applicable for the benefit of each of the two children under the section. Similarly, after the death of the wife, if Joan remains the only child, the whole of the income will be applicable for her benefit during her infancy, and thereafter the whole of the income will be payable to her by virtue of para. ii of sub-s. 1 of s. 31. If another child is born and the settlor does not exercise his power of appointment, the income applicable for Joan's benefit will be limited to one-half of the total income, that is, to more than the one-third now in question. If two children are born, it will be one-third. Only if three children are born will it be less than the one-third. In like manner, if Joan is the only child living at the death of the settlor and the power of appointment has not been exercised in favour of any issue of hers, she will be entitled, if she attains twenty-one or marries, to the whole of the capital. The result can be summed up as follows. In the years of assessment the one-third of the income was applicable for Joan's benefit and would remain so applicable during her infancy. On her attaining twenty-one it would be payable to her during the rest of the settlor's life. On his death she would become entitled to the whole of the capital, but these interests were liable to be cut down or defeated as follows: (1.) during the life of the wife by the birth of another child and an exercise of the settlor's power of appointment in such a way as to reduce Joan's interest during that period to less than one-third; (2.) after the death of the wife (*a*) by the existence of at least three more children of the settlor, (*b*) by an exercise by the settlor of his power of appointment over the whole fund under which another child or other children of the settlor or the issue of another such child or other such children or of Joan herself took an interest or interests in more than two-thirds of the income of the settled fund so as to reduce Joan's interest to less than one-third.

In these circumstances, it is said on behalf of the Crown, the one-third of the income of the trust fund in respect of which the assessments now in question were raised was applicable for the benefit of Joan for some period less than her life in that, if any of the events just mentioned were to happen at some future date, Joan's interest would be reduced to less than one-third or destroyed altogether as the case might be. The possibility of one or other of these events happening is, it was argued, sufficient to bring the provisions of the Finance Act, 1922, into operation. In our opinion, this argument rests on a misconception as to the true meaning of those provisions. They can only come into operation in respect of a particular assessment. In other words, the Crown by means of an assessment is asserting that the income in the particular year to which the assessment relates is income of which it can be truly said at the time that it is " payable to or applicable for the benefit of " the child for some period less than the life of the child. In the years to which these assessments relate it was impossible to support this assertion. Whether the income would or would not continue to be payable to or applicable for the benefit of Joan for the whole of the rest of her life depended on quite unpredictable events. All that could be said of it was that the income might or might not continue to be so applicable according to circumstances. This, however, is not sufficient to discharge the burden imposed on the Crown by the section, which is to establish affirmatively that the income is—not that it may be—payable or applicable for some period less than the life of the child. In applying the section what has to be considered is the effect of the settlement in the light of circumstances as they exist at the relevant time. If it can be said that the terms of the settlement will at some future date so operate as to cut down or destroy the interest of the child the section will apply as to part or the whole of the income as the case may be. If, on the other hand, all that can be said is that, if the circumstances existing at the time continue to exist undisturbed by some extraneous event which may or may not happen (such as the exercise of a power of appointment, or the birth of another child, or, as in the present case, three other children) the income will be payable to or applicable for the benefit of the child for the whole of its life and will only cease to be so payable or applicable if and when such an extraneous event does happen, the sub-section has, in our opinion, no application.

We may illustrate the way in which we think the section works by taking a simple example. A settlor settles property upon trust to pay the income equally among all his children for the time being living. He has one child only when it is sought to assess him under the section. The assessment cannot be supported for the reasons which we have already given. Thereafter another child is born. The position then will be that thereafter one-half of the income will be payable to the elder child and one-half to the younger. In respect of neither of these moieties will it be possible to say that it is payable to the child entitled to it for some period less than the life of that child. Unless and until a third child is born the two children will continue to enjoy their respective moieties of the income, and so on with subsequent children. To hold otherwise would mean that the only course which a father could take without subjecting himself to the operation of the section would be to make a separate settlement of a defined amount for each child. This, as it appears to us, would be to give to the section an operation far beyond the mischief which it was obviously designed to remedy and is not to be extracted from its language.

The conclusion to which we have come appears to us to be entirely consistent with the decision in *Watson's Trustees* v. *Wiggins* (1) subject to one point to which we will refer in a moment. In that case the interest of the child was liable to be defeated in the event of the exercise of a power of revocation contained in the settlement which was exercisable by the settlor with certain consents. Unless and until this power was exercised the income belonged to the child. It was held that the income was not brought within these provisions of the section by reason of the existence of this power of revocation. In the House of Lords Lord Buckmaster said (2): "It appears to "me that it is impossible to say that it is for a period less than "the life of the child merely because there is a means by which "the actual estate that is conferred may be terminated and "cut short. The limitation is for the life of the child, subject "to a power which enables the limitation itself to be set aside, "but that does not prevent the limitation while it lasts, and is "not set aside, being for the life of the child." Before us, however, great reliance was placed by counsel for the Crown on a dictum of Romer L.J. (as he then was) (3) who said that, if the direction in that case had been to pay the income to the child during his life or until the power of revocation was exercised, he thought he could agree that the infant was not

(1) [1933] 1 K. B. 245; [1934] A. C. 264.

(2) [1934] A. C. 271.

(3) [1933] 1 K. B. 258.

entitled by virtue or in consequence of the instrument during his life. With all respect, we cannot agree with this very tentative expression of opinion. Even if the language had been as supposed it would still have been the case that in the year of assessment the child would unquestionably continue to enjoy the income by virtue or in consequence of the settlement until such time (if ever) as the interest was defeated by the exercise of the power of revocation. In any case, the language in the present case is not " until " but " until and subject to," and we can see no ground for not giving full force to the words " subject to." The appeal must be dismissed with costs.

MACKINNON L.J.: I had written a judgment of my own, but having heard the judgment of the Master of the Rolls I find that if I were to read it I should be only repeating in different language what he has said. In these circumstances it is sufficient to say that I entirely agree.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Rye & Eyre.*

H. C. G.

REX v. I.C.R. HAULAGE, LIMITED AND OTHERS.

C. C. A.
1944
April 24, 25; May 10.
Humphreys, Croom-Johnson and Stable JJ.

Criminal law—Conspiracy to defraud—Company—Mens rea—Liability to conviction.

An indictment for a common law conspiracy to defraud will lie against a limited company.

APPEAL against conviction.

The appellant company was charged with ten other defendants at Maidstone Assizes with a common law conspiracy to defraud. Before the hearing of the charge objection was taken on behalf of the company that an indictment alleging a common law conspiracy to defraud would not lie against a limited company. The commissioner of assize refused to quash the indictment and the jury convicted the company who were ordered to pay a fine. The company appealed.

Serjeant Sullivan K.C. and *Raeburn* for the company. The commissioner was wrong in refusing to quash the indictment. The offence charged involved mens rea on the part of

C. C. A.

1944

REX
v.
I. C. R.
HAULAGE,
LD.

the accused, and, unless expressly made liable by statute, a company cannot be guilty of such an offence: see per Channell J. in *Pearks, Gunston and Tee* v. *Ward* (1). The dictum of Channell J. was approved in *Mousell Bros.* v. *London and North Western Ry. Co.* (2). It is true that a company may be civilly liable for conspiracy, but that liability depends on a different principle. In a civil action the gist of the matter is the damage suffered by the plaintiff for which a company may be vicariously responsible, but in a criminal prosecution the gist is the actual intention in the mind of the accused. There is no principle which allows the imputation of such an intention to a company. It is settled law that a company cannot be guilty of murder, and the reason cannot be that the death sentence cannot be inflicted on a company since it has also been held that a company is incapable of committing manslaughter although in that case a fine can be imposed: see *Rex* v. *Cory Brothers & Co. Ld.* (3).

Comyns Carr K.C. and *Aiken Watson* for the Crown. A company may rightly be indicted on a charge of conspiracy to defraud. Where a state of mind or an intention is required as an element of a criminal offence, the state of mind or intention of a servant or agent of the company is the mind or intention of the company. The principle was correctly stated in the argument for the respondents in *Mousell Bros.* v. *London and North Western Ry. Co.* (4) where it was thus put: "A body "corporate can only act through its officers and servants. The "act and intention of its officer are the act and intention of the "corporation. A company has been held liable to a penalty "for giving a false warranty under the Sale of Food and "Drugs Act, 1889, where the servants of the company had no "reason to believe that the warranty was true . . . . This is "not a question of the master being liable for the criminal "act of his servant, but of the liability of a corporation, which "can only be liable for the act of its officer in the scope of his "employment." The suggested limitations of a company's criminal liability are to be found in various dicta: see *Rex* v. *Great Northern Ry. Co.* (5), per Lord Denman; *Pharmaceutical Society* v. *London and Provincial Supply Association* (6), per Lord Blackburn; *Pearks, Gunston & Tee, Ld.* v. *Ward* (1),

(1) [1902] 2 K. B. 1, 11.
(2) [1917] 2 K. B. 836.
(3) [1927] 1 K. B. 810.
(4) [1917] 2 K. B. 836, 841.
(5) (1874) L. R. 9 Q. B. 315, 325.
(6) (1880) 5 App. Cas. 857, 869.

per Channell J.; *Chuter* v. *Freeth & Pocock, Ld.* (1), per Lord Alverstone, C.J.; *Mousell Bros.* v. *North Western Ry. Co.* (2), per Atkin J.; *Triplex Safety Glass Co., Ld.* v. *Lancegaye Safety Glass Co., Ld.* (3); but none of these affects the general principle already stated. All the relevant cases on the subject were considered in *Director of Public Prosecutions* v. *Kent and Sussex Contractors, Ld.* (4) in which the Divisional Court attempted to reconcile the earlier decisions and bring the position up to date. The court there decided that a company could rightly be convicted of an offence in which there was implied an act of will or state of mind and the reasoning and decision in that case are applicable to the present.

Raeburn in reply. The authorities which suggest that a company can commit offences involving mens rea are explained by the restricted sense in which mens rea is now understood. A conspiracy to defraud involves a degree of wickedness of mind going far beyond mens rea in its present meaning, and no authority has yet carried the fictitious mental capacity of a company to such a stage. The line of a company's liability is properly drawn at offences involving no more than the intent to commit the unlawful act irrespective of actual knowledge of its illegality.

THE COURT stated that the appeal would be dismissed, but they would embody their reasons in a written judgment.

May 10. The judgment of the Court was read by

STABLE J., who stated the facts and continued: The question before us is whether a limited company can be indicted for a conspiracy to defraud. Section 33 of the Criminal Justice Act, 1925, removed certain procedural obstacles which had hitherto existed in connexion with the trial of criminal offences alleged against corporations. This section did not enlarge the ambit of a company's criminal responsibility, but provided machinery for simplifying its enforcement.

It was conceded by counsel for the company that a limited company can be indicted for some criminal offences, and it was conceded by counsel for the Crown that there were some criminal offences for which a limited company cannot be in-

(1) [1911] 2 K. B. 832, 835.
(2) [1917] 2 K. B. 836, 841.
(3) [1939] 2 K. B. 395.
(4) Ante. p. 146.

dicted. The controversy centred round the question where and on what principle the line must be drawn and on which side of the line an indictment such as the present one falls. Counsel for the company contended that the true principle was that an indictment against a limited company for any offence involving as an essential ingredient "mens rea" in the restricted sense of a dishonest or criminal mind, must be bad for the reason that a company, not being a natural person, cannot have a mind honest or otherwise, and that, consequently, though in certain circumstances it is civilly liable for the fraud of its officers, agents or servants, it is immune from criminal process. Counsel for the Crown contended that a limited company, like any other entity recognized by the law, can as a general rule be indicted for its criminal acts which from the very necessity of the case must be performed by human agency and which in given circumstances become the acts of the company, and that for this purpose there was no distinction between an intention or other function of the mind and any other form of activity.

The offences for which a limited company cannot be indicted are, it was argued, exceptions to the general rule arising from the limitations which must inevitably attach to an artificial entity, such as a company. Included in these exceptions are the cases in which, from its very nature, the offence cannot be committed by a corporation, as, for example, perjury, an offence which cannot be vicariously committed, or bigamy, an offence which a limited company, not being a natural person, cannot commit vicariously or otherwise. A further exception, but for a different reason, comprises offences of which murder is an example, where the only punishment the court can impose is corporal, the basis on which this exception rests being that the court will not stultify itself by embarking on a trial in which, if a verdict of Guilty is returned, no effective order by way of sentence can be made. In our judgment these contentions of the Crown are substantially sound, and the existence of these exceptions, and it may be that there are others, is by no means inconsistent with the general rule.

The company relied on a number of authorities, including *Pearks, Gunston & Tee, Ld.* v. *Ward* (1), a decision under s. 6 of the Food and Drugs Act, 1875, and, more particularly, on a passage in the judgment of Channell J., where he said: "By "the general principles of the criminal law, if a matter is made "a criminal offence, it is essential that there should be some-

(1) [1902] 2 K. B. 1, 11.

"thing in the nature of mens rea, and, therefore, in ordinary "cases a corporation cannot be guilty of a criminal offence, "nor can a master be liable criminally for an offence committed "by his servant." This passage was cited with approval in *Mousell Bros., Ld.* v. *London and North Western Ry. Co.* (1), per Lord Reading C.J. The actual decision in *Pearks, Gunston and Tee, Ld.* v. *Ward* (2) does not help the company, as it was held that the limited company was properly convicted of the offence charged, nor do we think that the dictum of the learned judge contains the implication suggested in as much as in the same judgment Channell J. expressed his inclination to the view that a corporation could be convicted of an offence under s. 3 of the same Act in which criminal intention or knowledge is an essential ingredient. This view was adopted as the law in *Chuter* v. *Freeth and Pocock, Ld.* (3), where a limited company was charged before a magistrate under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, with giving a purchaser of food a false warranty. The section contains a proviso to the effect that it is a defence to a charge under the section if the person charged proves that when he gave the warranty he believed that it was true. The magistrate, although of opinion that the evidence established the giving of a knowingly false warranty by the company's servant, dismissed the charge against the company on substantially the grounds contended for by the company in this case. The case came before a Divisional Court by way of case stated where it was decided that the magistrate had taken too narrow a view of the law. Lord Alverstone C.J., in giving the judgment of the court in which Pickford J. and Lush J. concurred, said: "There is "no reason why a warranty should not be given by a corpora-"tion. It can give a warranty through its agents, and through "its agents it can believe or not believe, as the case may be, "that the statements in the warranty are true." This passage, in our judgment, is directly in point on the question we have to decide. In *Mousell Bros., Ld.* v. *London and North Western Ry. Co.* (1) it was held that a limited company was properly convicted of an offence under s. 99 of the Railway Clauses Consolidation Act, 1845, of giving a false account with intent to avoid the payment of tolls, the basis of the decision (see per Lord Reading C.J. (4), and Atkin J. (5)), being that, in relation to that section, there was no distinction between a limited company and a natural principal. In our judgment, that case does not determine the question we have to decide one way or the other inasmuch as the construction that the court placed on that section of the Act of Parliament was that it made the principal criminally responsible for the act of the servant, irrespective of whether the principal was a natural or artificial person or had or had not present in his own mind the intention which was a necessary ingredient in the offence. It did not decide that in no circumstances a criminal intention in the mind of a servant or agent can be imputed to a principal who is a limited company.

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(1) [1917] 2 K. B. 836, 843.
(2) [1902] 2 K. B. 1, 11
(3) [1911] 2 K. B. 832, 836.
(4) [1917] 2 K. B. 845.
(5) Ibid. 846.

The authority latest in date which was cited in support of the company's contention was *Rex* v. *Cory Bros. & Co., Ld.* (1), where Finlay J. on motion quashed an indictment against a limited company containing two counts, the first for manslaughter, which is a felony, and the second for an offence under s. 31 of the Offences against the Person Act, 1861, a statutory misdemeanor punishable with penal servitude. Both these offences can be punished on conviction with the infliction of a fine, the felony under s. 5 of the Offences against the Person Act, 1861, and the misdemeanor by common law. It appears from the report that the substantial argument addressed to the court was that s. 33 of the Criminal Justice Act, 1925, had enlarged the category of offences for which a corporation could be indicted, a contention which, as we think rightly, the learned judge rejected holding that the section merely dealt with procedure. The learned judge advanced no reasons of his own for quashing the whole indictment, simply expressing the view that he felt compelled by the authorities to which his attention had been called to decide as he did. It is sufficient, in our judgment, to say that, inasmuch as that case was decided before the decision in *Director of Public Prosecutions* v. *Kent and Sussex Contractors, Ld.* (2), and that *Chuter* v. *Freeth and Pocock Ld.* (3), was not cited at all, if the matter came before the court to-day, the result might well be different. As was pointed out by Hallett J. in the *Kent and Sussex Contractors* case (4), this is a branch of the law to which the attitude of the courts has in the passage of time undergone a process of development.

In support of the contention of the Crown we were referred to

(1) [1927] 1 K. B. 810.
(2) Ante, p. 146.
(3) [1911] 2 K. B. 832.
(4) Ante, p. 157.

a number of authorities. The earliest of these to which we think it necessary to refer is *Pharmaceutical Society* v. *London and Provincial Supply Association* (1). The decision in that case, which was earlier than the Interpretation Act, 1889, was that the word "person" in the Act then under consideration did not include an incorporated company. Lord Blackburn, however, said (2): "But I may also say now, in order to avoid "coming back to it, that I do not feel the least difficulty arising "from what seems to have troubled some of the learned judges "in the court below. If this word does include a corporation— "I quite agree that a corporation cannot, in one sense, commit "a crime—a corporation cannot be imprisoned, if imprison- "ment be the sentence for the crime; a corporation cannot be "hanged or put to death if that be the punishment for the "crime; and so, in those senses a corporation cannot commit a "crime. But a corporation may be fined, and a corporation "may pay damages; and therefore I must totally dissent, "notwithstanding what Bramwell L.J. said, or is reported to "have said, upon the supposition that a body corporate or a "corporation that incorporated itself for the purpose of "publishing a newspaper could not be tried and fined, or an "action for damages brought against it for a libel; or that a "corporation which commits a nuisance could not be convicted "of the nuisance or the like. I must really say that I do not "feel the slightest doubt upon that part of the case. If you "could get over the first difficulty of saying that the word "'person' here may be construed to include an artificial person, "a corporation, I should not have the least difficulty upon those "other grounds which have been suggested." Lord Blackburn's emphatic expression of opinion that a limited company can be indicted and convicted for publishing a criminal libel was later accepted by the Court of Appeal in *Triplex Safety Glass Co., Ld.* v. *Lancegaye Safety Glass Co., Ld.* (3), where it was held that a limited company was entitled to object to answering an interrogatory on the ground that the answer would tend to incriminate it. As an actual condition of mind amounting to express malice may be an element in the offence of libel, it is plain that the Court of Appeal decided that, whatever the principle may be that fixes the line between those offences for which a limited company can and those for which it cannot be indicted, it is not the presence or absence in the human agent

(1) 5 App. Cas. 857, 869.

(2) Ibid. 869.

(3) [1939] 2 K. B. 395.

of a particular condition of mind. It would be unreasonable to suppose that a limited company can be indicted for a criminal libel only in those cases in which express malice is not proved, or that it could defeat a prosecution by proving that its duly authorized agent was, in fact, actuated by malice.

The latest authority is the *Director of Public Prosecutions* v. *Kent and Sussex Contractors, Ld.* (1). A limited company was charged with offences under a Defence of the Realm Regulation which involved an intent to deceive. The justices dismissed the informations on the ground that a body corporate could not be guilty of the offences charged inasmuch as an act of will or state of mind which could not be imputed to a corporation was implicit in the commission of these offences. On a case stated to a Divisional Court this conclusion of law on the part of the justices was held to be erroneous, and the case was remitted to them to hear and determine. It is clear that the state of mind involved was a dishonest state of mind, namely, an intention to deceive and that the state of mind was an essential element in the offence. There is a distinction between that case and the present, in that there the offences were charged under a regulation having the effect of a statute, whereas here the offence is a common law misdemeanor, but, in our judgment, this distinction has no material bearing on the question we have to decide. Lord Caldecote C.J. said (2): "the real point we "have to decide . . . . is whether a company is capable of an "act of will or of a state of mind, so as to be able to form an "intention to deceive or to have knowledge of the truth or "falsity of a statement," and after dealing with a number of authorities, he proceeds (3): "The offences created by the "regulation are those of doing something with intent to deceive "or of making a statement known to be false in a material "particular. There was ample evidence, on the facts as stated "in the special case, that the company, by the only people who "could act or speak or think for it, had done both these things, "and I can see nothing in any of the authorities to which we "have been referred which requires us to say that a company is "incapable of being found guilty of the offences with which "the respondent company was charged." In his judgment in the same case Macnaghten J. says as follows: "It is true that "a corporation can only have knowledge and form an intention "through its human agents, but circumstances may be such

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(1) Ante, 146.
(2) Ante, p. 151.
(3) Ante, p. 155.

" that the knowledge and intention of the agent must be " imputed to the body corporate . . . . If the responsible " agent of a company, acting within the scope of his authority, " puts forward on its behalf a document which he knows to be " false and by which he intends to deceive, I apprehend that " according to the authorities that my Lord has cited, his " knowledge and intention must be imputed to the company." With both the decision in that case and the reasoning on which it rests, we agree.

In our judgment, both on principle and in accordance with the balance of authority, the present indictment was properly laid against the company, and the learned commissioner rightly refused to quash. We are not deciding that in every case where an agent of a limited company acting in its business commits a crime the company is automatically to be held criminally responsible. Our decision only goes to the invalidity of the indictment on the face of it, an objection which is taken before any evidence is led and irrespective of the facts of the particular case. Where in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company, and, in cases where the presiding judge so rules, whether the jury are satisfied that it has been proved, must depend on the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case. It was because we were satisfied on the hearing of this appeal that the facts proved were amply sufficient to justify a finding that the acts of the managing director were the acts of the company and the fraud of that person was the fraud of the company, that we upheld the conviction against the company, and, indeed, on the appeal to this court no argument was advanced that the facts proved would not warrant a conviction of the company assuming that the conviction of the managing director was upheld and that the indictment was good in law.

Appeal dismissed.

Solicitors for appellant company: *Braby & Waller.*
Solicitors for prosecution: *Wilkinson, Howlett & Moorehouse.*

P. B. D.

C. A.

1944

Mar. 31 ;
April 24.

Scott and
du Parcq L.JJ.,
Cohen J.

CALLAGHAN *v.* FRED KIDD & SON (ENGINEERS), LIMITED.

Negligence—Master and servant—Factory—Safety—Safe means of access to place of employment—Provision and maintenance of "so "far as reasonably practicable"—Onus of proof—Factories Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 67), *s.* 26, *sub-s.* 1.

The plaintiff, an apprentice fitter in the employment of the defendants, while engaged about the operation of grinding a tool on a grindstone was injured in passing from one stone to another, as the result of tripping over some iron bars left lying in front of the pedestal on which the grindstones stood. The bars had been brought there by a girl employee to be ground, and, according to the usual practice, the girl would have performed the operation and removed the bars. On this occasion, however, without imputation of negligence, she left them lying on the ground. There was an open space of about 4 feet on both sides and at the back of the pedestal and another of 18 feet in front of it, which spaces were used by many employees during a shift of work. The management of the factory were aware that bars were often placed on the ground though not often left there. The plaintiff claimed damages from the defendants alleging that they had committed a breach of the statutory obligation imposed on them by s. 26, sub-s. 1, of the Factories Act, 1937, which provides that there shall "so far as is reasonably practicable be provided and "maintained safe means of access to every place at which any "person has at any time to work":—

Held, that the words "maintain safe means of access" were equivalent to "maintain the safety of the access," and imposed a positive and continuing duty; that the access was unsafe at the time of the accident; that as the defendants, although they knew that rods were frequently left lying about, had issued no general orders calling the attention of the staff to the danger of the practice, they had failed to maintain safe means of access; that it was reasonably practicable for them to have done so; and that their breach of statutory duty was the cause of the plaintiff's accident:—

Semble, that, as the fact of the difficulty or ease of doing what was necessary to maintain safety was much more within the knowledge of the management than of their workpeople, it was for the defence, whether in a prosecution or an action under the section, to establish the proposition of fact involved in the words of limitation of the section.

APPEAL from Stockton-on-Tees county court.

The plaintiff, J. H. Callaghan, was employed by the defendants, Fred Kidd and Son (Engineers), Ld., as an apprentice fitter and turner. On June 1, 1943, at about

4.30 p.m., he had occasion to grind a tool and he went to the place where the grindstones were situated. There were two grindstones, about 15 yards apart, mounted on a pedestal. After using the stone on the right, the plaintiff was crossing to that on the left when he tripped on some iron bars which were lying on the floor, and, in trying to save himself from falling, brought his hand in contact with the grindstone which was revolving at 2,500 revolutions a minute, so that he was injured. Evidence was given that normally there was a clear space of about 4 feet on both sides and at the back of the pedestal and a clear space of 18 feet in front of it, which spaces were used by many employees during a shift of work, but at the time of the accident there were eight to twelve iron bars, 2 feet long and $\frac{7}{8}$th inch thick, lying on the floor in front of the pedestal. The bars had been brought there by a girl to be ground in accordance with the usual practice. As a general rule the girl bringing such bars would grind them at once and take them away, but on this occasion the girl in question had gone away and left the bars on the ground. It was stated by a witness for the defendants that bars were often put on the ground, but not often left there. The plaintiff brought an action against the defendants, contending (1.) that the premises provided by the defendants were unsafe at the time of the accident by reason of the iron bars lying on the floor in such a position that the plaintiff tripped over them, and (2.) that the defendants had committed a breach of the statutory obligation imposed on them by s. 26, sub-s. 1, of the Factories Act, 1937, that "there shall so far as "reasonably practicable, be provided and maintained safe "means of access to every place at which any person has at "any time to work." The county court judge found that the plaintiff was not guilty of contributory negligence, that negligence could not reasonably be imputed to the girl who had left the bars at the foot of the pedestal, and that the accident came within the category of unavoidable accident. He was of opinion that the common law obligation to provide a safe system of working in respect of the grindstone had been performed by the defendants; that the accident was caused, not by a defect in the system, but by the casual act of a fellow employee of the plaintiff not amounting to negligence; and that the defendants were not liable. He further held that the defendants had provided and maintained a safe means of access to the grindstones and that they could not be held to have committed a breach of their statutory obligation by reason merely of a casual interference with the means of access by a fellow employee of the plaintiff. He, therefore, gave judgment for the defendants, and the plaintiff appealed.

Edgedale for the plaintiff. The decision of the county court judge was wrong. Section 26, sub-s. 1, of the Factories Act, 1937, imposes on the defendants an absolute and continuing obligation to provide and maintain a safe means of access, and the accident here was attributable to the fact that they failed to take any steps to keep the access clear. An act of casual interference by a fellow servant is no answer to a claim for the breach of a statutory requirement. The defendants must go further and show that the casual interference was something which reasonably practicable steps on their part would not have prevented. Here the defendants were aware that bars were often left lying on the ground, and they took no steps, by issuing orders or otherwise, to stop the practice.

Pugh for the defendants. The decision of the judge was right, save that, on the evidence, he should have held that the plaintiff was guilty of contributory negligence which would have disposed of the questions of negligence at common law and breach of statutory duty. With regard to negligence at common law, the judge's finding was that it was the normal practice for the girl who brought the bars to remain and grind them. That was the system and it was not the employers' fault that it was not carried out by the girl on this occasion: per Lord Wright in *Wilsons & Clyde Coal Co.* v. *English* (1). So far as the statutory regulation is concerned, the onus is on the plaintiff to prove an absence of provision and maintenance by the defendants "as far as is reasonably practicable." That means, so far as it is normally within the powers of the employers to control the matter. Section 26, sub-s. 1, is not absolute in its terms since the words used are "reasonably "practicable." It was for the judge who heard the evidence to say whether the defendants had taken all reasonable means and he has found on sufficient evidence that they had. [He also referred *Rex* v. *Carr-Briant* (2) and *Britannic Merthyr Coal Co., Ld.* v. *David* (3).]

Cur. adv. vult.

(1) [1938] A. C. 57, 84.
(2) [1943] K. B. 611.
(3) [1909] 2 K. B. 146; [1910] A. C. 74.

April 24. The judgment of the court was read by

SCOTT L.J. This appeal depends on the correct interpretation of the Factories Act, 1937, s. 26, sub-s. 1, and its application to the facts as found by the county court judge. The salient points are that the pedestal which carried the two grindstones, which revolved at the rate of 2,500 times a minute, was a piece of machinery to which the operatives in the factory—including many girls—were, as a matter of normal routine, continually resorting to grind tools, including iron bars of the type of those over which the plaintiff tripped. That, when he tripped up, he should stretch out a hand to save himself was natural, if not inevitable, and the judge was obviously right in acquitting him of negligence in failing to observe the collection of rusty iron bars lying side by side on the flat concrete floor close to the pedestal as he walked round from the grindstone on the other side of which he was going to complete his sharpening process. As the judge says, he would be intent on his job with his eyes up and not down. It was contended for the defendants, before us, pursuant to a written notice to the plaintiff, that the evidence not only justified the inference of contributory negligence, but that there was no evidence the other way on which the acquittal of the plaintiff by the judge could in law be justified. That contention is plainly untenable, and we say no more about it. Important evidence was given by two witnesses for the defendants that there was a space of clear floor of 4 feet to the right and left of and behind the pedestal, and a space of 18 feet in front, and that employees were in the habit, with the approval of the management, of coming from all directions to the pedestal for tool grinding, and of doing so in large numbers throughout the day. It was the duty of the girls to grind the iron rods for some unstated purpose, and they "normally "brought eight to twelve rods at a time and laid them on the "floor close to the pedestal. The girls were supposed to stay "by them during the grinding process, and then to carry them "all away again." The system of working at the factory was, therefore, clearly one in which the management ought to have seen to it that the above practice was made a regular duty. It was a condition of the access to the grindstones remaining continuously safe, and that fact ought to have been obvious to the management. The plaintiff's particulars of claim did not allege this form of common law negligence against the defendants, but the judge expressly dealt with it in his

C. A.

1944

Callaghan
v.
Fred Kidd
& Son (Engineers),
Ld

judgment and decided the issue in favour of the defendants. It is not necessary for us to decide it, but it must not be assumed that we agree with his view.

The real question in the appeal arises on the Factories Act, 1937, and on that the judge held that there was no breach of duty by the defendants to " maintain a safe means of " access," his reason being that " the unsafe condition which " caused the accident was brought about by reason merely " of a casual interference on the part of a fellow employee of " the plaintiff." With that conclusion we cannot agree. He had held that the girl who went away and left the bars unguarded on the floor was not negligent because he could not blame her for failing to realize that to do so would be dangerous to others, but that very finding, in our view, came very near to involving a correlative duty on the management to impress on all operatives the imperative duty of not leaving bars on the floor unguarded for others to trip over unexpectedly. If the failure of the management to give general directions to that effect was, as we think, a defect in the system, that would impose common law liability. The failure has, however, a repercussion also on the issue of breach of statutory duty. The section imposes a direct obligation on the occupier of the factory, not only to " provide," but also to " maintain, safe " means of access," and, in our opinion, the latter words are equivalent to " maintain the safety of the access " and impose a positive and continuing duty. What Lord Wright said in *Wilsons & Clyde Coal Co.* v. *English* (1) of the employers' duty to maintain a safe system of working is applicable—perhaps even a fortiori—to the positive duty of the employer created by the subsection : Lord Wright said : " I think the whole " course of authority consistently recognizes a duty which " rests on the employer and which is personal to the employer, " to take reasonable care for the safety of his workmen, " whether the employer be an individual, a firm, or a company, " and whether or not the employer takes any share in the " conduct of the operations. The obligation is threefold, as " I have explained. Thus the obligation to provide and maintain proper plant and appliances is a continuing obligation. " It is not, however, broken by a mere misuse or failure to use " proper plant and appliances due to the negligence of a " fellow-servant or a merely temporary failure to keep in " order or adjust plant and appliances or a casual departure

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(1) [1938] A. C. 57, 84.

C. A.

1944

Callaghan
v.
Fred Kidd
& Son (Engineers),
Ld.

" from the system of working, if these matters can be regarded " as the casual negligence of the managers, foreman, or other " employees. It may be difficult in some cases to distinguish " on the facts between the employers' failure to provide and the " fellow-servants' negligence in the respects indicated." Counsel for the defendants sought to escape from the obligation of the section by contending (1.) that it puts on the plaintiff the burden of alleging and proving in any given case, whether in a prosecution or an action, that it was " reasonably " practicable " to do whatever might be necessary to ensure safety, and that in the present case the plaintiff had failed to discharge that burden ; or, alternatively (2.) that the evidence as a whole showed that it was not " reasonably practicable." The judge did not, we think, really address his mind to either of these issues, and, consequently, it cannot be said that there is on them either a decision of law or a finding of fact by him against the plaintiff. It is unnecessary to decide the question of onus of proof, for on the evidence two things are, we think, clear : (*a*) that the access was definitely unsafe at the time of the accident, and (*b*) that the management had given no general orders to call the attention of their staff to the danger entailed by leaving anything on the flat surface of the floor near to the pedestal, although they knew quite well that rods were not infrequently deposited there by the girls who brought them and there left unguarded.

For these reasons the conclusions are inevitable : (i.) that the defendants had failed " to maintain safe means of access," (ii.) that it was reasonably practicable to do so, and (iii.) that the defendants' breach of statutory duty was the cause of the plaintiff's injury. If it were necessary to decide the question of onus, the obvious fact that the difficulty or ease of doing what is necessary to maintain safety is so much more within the knowledge of the management than of their workpeople makes us disposed to hold that it is for the defence, whether in a prosecution or an action, to establish the proposition of fact involved in the words of limitation of the section. The appeal must be allowed with costs here and below.

Appeal allowed.

Solicitor for the plaintiff : *W. H. Thompson.*
Solicitor for the defendants : *F. G. Bowles.*

P. B. D.

1944

April 27.

Tucker J.

JAMES CLARK (BRUSH MATERIALS), LIMITED *v.* CARTERS (MERCHANTS), LIMITED.

Arbitration—Setting aside award—Error of law on face of award—Duty of court to take award at face value—Presumption of finding by umpire of facts supporting award.

In determining whether the award of an arbitrator should be remitted or set aside on the ground that there is an error of law appearing on the face of it, the court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award, but must take it at its face value.

MOTION to set aside or remit award.

By a contract, dated August 1, 1941, the sellers, Carters (Merchants), Ld., undertook to sell to the buyers, James Clark (Brush Materials), Ld., thirty tons of Bahia cut piassiva which, by cl. 2, was to be shipped c.i.f. to the United Kingdom "by "first available steamer before the expiry of our [sellers'] "import permit; i.e., Oct. 24, 1941," but, by cl. 3, subject to the revocability of the import licence. The contract also incorporated the terms, conditions and rules contained in Contract No. 1 of the London General Produce Brokers' Association. Contract No. 1 contained (inter alia) the following clauses: "Prevention of and/or delays of shipment: "If shipment of the whole or any part of the goods within "contract time is prevented by . . . . unforeseen absence or "withdrawal of freight facilities . . . . or any other causes "beyond the control of the shippers, and provided the aforementioned causes do not conflict with the meaning of the "frustration clause hereon, the time of shipment shall be "extended by 30 days without penalty or allowance . . . . 'Should shipment of the whole or part still be prevented by any "of the foregoing causes during such extended time, this "contract shall be void without penalty for any such portion "not shipped. . . ." "Frustration: If any one of the parties "is unable to perform any act or acts necessary for the due "fulfilment of this contract owing to British government "regulations, or government orders or enactments of the "country from which the goods are to be shipped or of the "country of destination named in this contract, this contract "shall be cancelled forthwith without penalty or allowance to "either party." The sellers failed to deliver the goods and a claim by the buyers for damages for breach of contract was referred to arbitration. The arbitrators disagreed and appointed an umpire, who made the following award: "After careful "consideration I find that freight space was not obtainable "within the period defined in this contract and I award that "the contract be forthwith dissolved without penalty or "allowance to either party." The buyers moved that the award be set aside as bad for error of law apparent on its face, or, alternatively, that it be remitted to the umpire for reconsideration.

A. J. Hodgson for the buyers. The award should be set aside, or, alternatively, remitted to the umpire for reconsideration. Where an error, whether of fact or law, appears on the face of an award, the award will be set aside unless the error is immaterial to the decision: see *Buerger* v. *Barnett* (1). The principle is stated in Russell on Arbitration and Award, 13th ed., p. 190, where the rule laid down by Williams J. in *Hodgkinson* v. *Fernie* (2) is referred to. In *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* (3), Lord Dunedin said: "An error in law on the face of the award means, "in their Lordships' view, that you can find in the award or a "document incorporated thereto . . . . some legal proposition "which is the basis of the award and which you can then say is "erroneous." As to remitting an award for reconsideration, see *F. R. Absalom, Ld.* v. *Great Western (London) Garden Village Society, Ld.* (4). In the present case the umpire is really saying that he finds as a fact that freight space was not obtainable within the period defined in the contract, and, therefore, he awards that the contract be forthwith dissolved without penalty or allowance to either party. A finding that non-availability of freight space simpliciter exonerates the sellers must necessarily be wrong in point of law. That raises a clear point of law which is erroneous on the face of it and is sufficient to warrant the setting aside of the award. The umpire has not given any other reasons for his award, and it is not an unfair inference to draw that, if he had reasons other than the one stated, he would have set them out. He does not say that the absence of freight space was due to causes set out in the "frus- "tration" and "prevention of and/or delays of shipment" clauses. [*Ashmore & Son* v. *C. S. Cox & Co.* (1); and *Landauer* v. *Asser* (2) were also referred to.]

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(1) (1919) 89 L. J. (K. B.) 161.

(2) (1857) 3 C. B. (N. S.) 189, 202.

(3) [1923] A. C. 480, 487.

(4) [1933] A. C. 592.

Devlin for the sellers. A question of law plainly arose in this arbitration and either party had a right to ask the umpire to state a case for the opinion of this court, but neither party did so. There is no proposition of law in this award, and, if there is, it has been properly decided having regard to the terms of the contract. Clause 3 of the contract, which says that it is " subject to the revocability of the import licence," shows that the obligation intended to be imposed on the sellers was to ship by the first available steamer before the expiry of the licence, and, if there were none, they were under no obligation to ship at all. Adopting Lord Dunedin's definition of " error " in law on the face of the award " in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* (3), the court has first to find whether there is a legal proposition which is the basis of the award. Here there is none, and one can only be found if there is read into the award the words " and for that " reason and that reason alone." An award, however, must be taken as it stands. It is not permissible to read words into an award or to draw inferences. The court is not entitled to speculate as to the umpire's reasons: see *Fuller* v. *Fenwick* (4). Even if words might be read into the award or inferences drawn, the buyers, to sustain their contention that there is an error in law on the face of the award, have still to show that there is no clause in the contract which, on the facts set out in the award, can support the conclusion reached by the umpire. It is possible to infer that the umpire meant that freight space was not obtainable for causes beyond the control of the sellers under the prevention of and/or delays of shipment clause or because of government interference within the frustration clause.

TUCKER J. [after stating the facts:] To succeed on this motion the buyers must show that there is a decision of law patent on the face of the award, and that that decision is necessarily wrong. As the result of the authorities, where parties choose to go to arbitration—and more especially, I would emphasize, where they arbitrate before a lay arbitrator, and agree to accept his decision—and they do not ask for a

(1) [1899] 1 Q. B. 436.
(2) [1905] 2 K. B. 184, 189.
(3) [1923] A. C. 480, 487.
(4) (1846) 3 C. B. 705, 711.

case to be stated on a point of law which arises during the arbitration—as they are entitled to do—they cannot complain if they get something which may not appear to them to be justice unless they substantiate the very stringent grounds on which an award can be remitted or set aside for error of law appearing on the face of it.

I have, first, to ascertain whether this award necessarily shows that it is based solely on the finding that "freight "space was not obtainable within the period defined within "this contract." I think that Mr. Devlin is right when he contends that it is not for me to read any words into this document, but must take it at its face value. Mr. Hodgson says that I should draw from the document the inference that the award is based only on this finding. I do not think, however, that I am entitled to draw any inference. In my view, I must look at the document to see if it says that the award is based on this finding alone. If it does not so state, it appears to me to be impossible for me to draw any inference, one way or the other. This would in itself be sufficient reason for my holding that I have no jurisdiction to remit or set aside this award, even if I might suspect, or be inclined to think, that it was highly probable that the finding stated was the foundation for the award.

Assuming that I am wrong, and that I ought to read this award as being based on the finding stated alone, I have then to see whether that is necessarily erroneous in point of law. Incorporated in this contract are the conditions and rules of Contract No. 1 of the London General Produce Brokers' Association, which contain two clauses that need consideration in this context. The first is called "Prevention of and/or "delays of shipment." It is true that the award does not find any fact which would show that this clause is applicable. None the less I read the finding "that freight space was not "obtainable within the period defined in this contract" as a finding consistent with the existence of facts which would make that clause applicable and bring about a further extension of thirty days for shipment. In my opinion, it is impossible to set aside an award of this kind on the assumption that facts have not been proved which would support a finding in the award, simply because the award does not say, one way or the other, that those facts have been established. It is my duty to look at the award in the way most favourable to its preservation, and, looking at it from that angle, I find it impossible to say, because the arbitrator has not set out these facts, that they have not been proved to his satisfaction.

The same observations apply to the "frustration clauses." In my view, it would be possible for facts to have been proved which would bring that clause into operation and would justify a finding that on that basis freight space was not obtainable within the period defined. I agree that it would have been much more simple if it had been so stated, and I am prepared to believe that no such issue was ever raised before the arbitrator, but I am not entitled to inquire into matters of that kind. On the award it is possible that such a case may have been made out and that it would be covered by the umpire's finding. For these reasons, it is impossible for me to set aside or to remit this award.

I will, however, mention a further matter which is the vital question on which Mr. Hodgson desires to have a decision. He says that the proper and only way to read this award is as a finding against the buyers on the mere fact that a steamer had not become available within the contract time, which, he says, was October 24, 1941, and that a finding by the arbitrator that that non-availability simpliciter exonerated the sellers must necessarily be wrong in point of law. That is on the assumption, of course, that that clause cannot be added to the "prevention of and/or delays of shipment" clause to which I have already referred. Mr. Hodgson says that that raises a clear point of law which is erroneous on the face of it. I agree that, if the award was founded on that finding alone, it would raise a clear point of law, but it is sufficient for me to say, without giving a decision on the point, which I do not think would be helpful to anybody, having regard to my previous finding, that I am by no means satisfied that it would necessarily be erroneous on the face of it, if that was the true meaning of this award. For these reasons the motion must be dismissed, with costs.

Motion dismissed.

Solicitors for the claimants: *Wilkinson, Bowen, Haslip & Jackson.*

Solicitors for the respondents: *Godden, Holme & Ward.*

A. W. G.

HOLLYHOMES *v.* HIND.

1944

May 4.

Viscount Caldecote C.J. Humphreys and Croom-Johnson JJ.]

Criminal law—Being found in a dwelling-house for an unlawful purpose—Found inside common entrance hall of set of flats—Charge of being found "in dwelling-house in occupation of L. W.", tenant of ground-floor flat—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.

The appellant was convicted under s. 4 of the Vagrancy Act, 1824, of being "found in and upon a certain dwelling-house in the occupation of L. W., at 8 Marlborough Buildings," Bath, for an unlawful purpose. L. W. occupied the ground-floor flat in the building, 8 Marlborough Buildings, which contained three separate flats, and she had the use of the entrance hall in common with the tenants of the other flats. The appellant was found in the entrance hall, outside L. W.'s flat. It was contended that the hall was not part of the dwelling-house of L. W.:—

Held, affirming the conviction, that the words "in the occupation "of L. W." were mere surplusage, and, the whole of the building, 8 Marlborough Buildings, being a dwelling-house and the appellant having been found in and upon it for an unlawful purpose, he had been rightly convicted.

CASE stated by the recorder of Bath.

The appellant, James Hollyhomes, was convicted by Bath justices on an information alleging that he was "found in and "upon a certain dwelling-house in the oocupation of Lilian "Williams at 8 Marlborough Buildings [Bath] for a certain "unlawful purpose, to wit, feloniously to steal the goods and "chattels of the said Lilian Williams, contrary to s. 4 of the "Vagrancy Act, 1824."

At about 2.40 p.m. on March 26, 1943, the appellant was found by the police standing in the inner part of the entrance hall of No. 8 Marlborough Buildings, Bath, near a door on which the name "Miss Williams" was painted. He stated falsely to the police that he had entered to keep an appointment with Miss Williams with a view to considering the purchase of certain silver goods which Miss Williams contemplated selling. In fact, Miss Williams had no such goods for sale and had made no appointment and was at the time away on holiday. He said that keys found in his possession were keys of locks in his house, but none fitted those locks. The recorder found as a fact that he was at the place mentioned for the unlawful purpose alleged.

It was contended for the appellant that the entrance hall where he was found formed no part of the dwelling-house of Miss Williams. No. 8 Marlborough Buildings contained three flats and a basement. The two lower flats were occupied by Miss Williams, the third by another tenant, and the basement by the caretaker. Miss Williams occupied the flats under a lease, dated June 23, 1941, which demised the two flats, together with the use in common with the other occupiers of any common landings, staircases, etc., including the entrance hall which the landlords covenanted to clean and keep in proper condition.

The justices convicted the appellant and sentenced him to three months' imprisonment. He appealed to quarter sessions, but the conviction was affirmed, subject to this case. The recorder was of opinion that the words " in the occupation of " Lilian Williams " were, for the purposes of s. 4 of the Act of 1824, surplusage and could be disregarded. No application by the respondent was made to him to amend the information by the omission of the words.

Comyns Carr K.C. and *G. L. Hardy* for the appellant. The conviction was bad. To identify the dwelling-house in and upon which the appellant is alleged to have been found, the prosecution added to the information the words " in the occupation of Lilian Williams," but the common entrance hall was not part of Lilian Williams' dwelling-house, it being occupied by the landlord: see *Allchurch* v. *Hendon Union Assessment Committee* (1). The recorder would not have been justified in striking out " in the occupation of Lilian Williams " as mere surplusage. The effect of so doing would have been to charge the appellant with being found in the whole building as one dwelling-house, and so to substitute a different charge from that preferred, and the conviction must be on the charge as framed. [*Moran* v. *Jones* (2) was referred to.] There could not be an amendment under Baines' Act, for this was a matter of substance: *Reg*. v. *Tomlinson* (3) and *Reg*. v. *Padbury* (4). As the words cannot be amended, a fortiori they cannot be struck out [Paley on Summary Convictions, 9th ed., 448, was referred to].

Clothier K.C. and *Vernon Gattie* for the respondent. No amendment was necessary because the words " in the occupation of Lilian Williams " were in fact correct, and the object of amendment is to make incorrect things correct. The words were matter, not of substance, but merely of description, and

(1) [1891] 2 Q. B. 436, 442.
(2) (1911) 75 J. P. 411.
(3) (1872) L. R. 8 Q. B. 12.
(4) (1879) 5 Q. B. D. 126, 128.

can be treated as surplusage. Had no evidence been given as to the occupation by Lilian Williams of her flat, the conviction still would have been good. The whole building was a dwelling-house, since it was occupied as such, and it was none the less so because it was occupied in separate flats, a fact which is only important from a rating point of view. This entrance-hall was a part of that dwelling-house. It is, of course, necessary to identify the dwelling-house mentioned in the charge, and that was sufficiently done by giving the postal address.

Comyns Carr replied.

HUMPHREYS J. Mr. Comyns Carr's first point for the appellant is that the place where the appellant was found was neither in nor upon a dwelling-house in the occupation of Lilian Williams. It is true, he says, that she has a lease, under which she occupies the ground and first floors, but her lease does not include the entrance hall, which is common to herself and the occupiers of other flats, and, therefore, it is wrong to say that the appellant was found in or upon the dwelling-house which she occupies. Technical though that may be, it is an argument to which a court of law has to pay attention and give effect if it is correct. In our opinion, however, the matter may be disposed of without discussing at any length the interesting question whether it would be right to describe the lady's tenancy as covering the entrance hall or to say that No. 8 Marlborough Buildings is a building which includes three separate hereditaments separately rateable within the occupancy of two separate persons, because for present purposes no distinction can be made between the part of the house occupied by Miss Williams and the part occupied by other tenants. Whatever may be said from the point of view of rating law, the whole building, No. 8 Marlborough Buildings, is clearly a dwelling-house. It may be said to contain three dwelling-houses, but that does not prevent it being itself a dwelling-house. It is used as a dwelling-house, and it is occupied as a dwelling-house. Why, then, is this conviction not right, when the appellant was found in and upon premises which are used as a dwelling-house ?

It was argued for the respondent, and, in our opinion, rightly argued, that the words " in the occupation of Lilian Williams " may be disregarded as being mere surplusage. No one doubts the necessity for there being sufficient accuracy and sufficient detail in a conviction to enable the accused person to know exactly what is the place where it is said that he was found, otherwise, if he were later charged with that same offence, he would not be able to prove that he had been already convicted of it. No doubt it would not have been sufficient, *e.g.*, to say that the appellant had been found in a dwelling-house in the city of Bath, but can anybody doubt that sufficient description of this dwelling-house is given when it is described as " No. 8 " Marlborough Buildings " ? That is the postal address, and that is the way in which the whole building would be described by anybody who was going there. That being so, it was quite unnecessary to refer to the occupancy of Miss Williams. The information and the conviction would have been good if they had never mentioned the name of the person who occupied the ground floor and first floor maisonette. I will go further, and say that, if the evidence of the police officer, when challenged, had been : "I do not know who occupies that maisonnette. " I know it is a dwelling-house. I know there is a lady living " there, but what the terms of her lease are I do not know," I should still hold that the appellant was rightly convicted of being found in and upon a dwelling-house within the meaning of s. 4 of the Vagrancy Act, 1824.

It is not without interest to see how wide are the words of s. 4. " Every person being found in or upon any dwelling-" house, warehouse, coach-house, stable or outhouse, or in any " enclosed yard, garden or area, for any unlawful purpose." I cannot think that any court of justice would take the view that it was necessary to describe in a conviction of the offence with which we are here concerned with the same particularity and accuracy as might be necessary for totally different purposes, such as rating, either the name of the occupant or the details of the occupancy of the person outside whose door the man was found, the offence being that he was found in or upon the whole building, that building being a dwelling-house.

That view renders it unnecessary, in my opinion, to deal with questions of amendment, or whether there was power of amendment here, but I will add that, in my view, the person, whoever it was, who was appearing for the prosecution was quite right in not applying for leave to amend because no leave is necessary to amend something which is surplusage. The proper way to treat that which is surplusage is to disregard it, not to amend it. I think the learned recorder's judgment admirably expresses the law, and was right in every respect.

Viscount Caldecote C.J. I agree entirely with the judgment which has just been delivered.

Croom-Johnson J. I agree. Proceedings before justices, certainly up to the point of actual conviction, need not state every conceivable thing which the defence think they would like to have stated. The matter is now dealt with by s. 32 of the Criminal Justice Act, 1925, under which it is sufficient if there is " a statement of the specific offence . . . . together with " such particulars as may be necessary for giving reasonable " information as to the nature of the charge." Sub-section 3 of the section provides that after stating the offence shortly in ordinary language (sub-s. 2), " necessary particulars of the " offence shall be set out in ordinary language, in which the use " of technical terms shall not be required." It is no part of this offence to show that the premises were occupied or unoccupied, and, therefore, it was not necessary to deal with that matter. Consequently the words " in the occupation of Lilian " Williams " were surplusage. Mr. Comyns Carr emphasized somewhat that, if those words were ignored for that reason, that would be to charge a distinct and different offence. I cannot follow that. The offence charged under the statute is an offence, as Humphreys J. has pointed out, with reference to a dwelling-house. I cannot see that there is any departure from that when, the facts being stated, it turns out that the part of the premises on which the offence is alleged to have been committed might, for the purpose of rating, be said to be in the occupation of some other person. Occupancy has nothing to do with the charge, and the wholly artificial distinction which was sought to be raised to meet the point about surplusage fails.

Appeal dismissed.

Solicitors for appellant : *Marris & Shepherd.*

Solicitors for respondent : *Sharpe, Pritchard & Co.*, for *J. B. Ogden, Bath.*

W. L. L. B.

C. A.

1944

May 18.

Scott, MacKinnon and Luxmoore L.JJ.

WHITE *v.* RICHMOND COURT, LIMITED.

Landlord and tenant—Rent restriction—Standard rent—Dwelling-house not previously let—Rent fixed by lease—Reduced rent specified in later deed—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17, *s.* 12, *sub-s.* 1 (*a*) (*as amended by s.* 3, *sub-s.* 1, *and sch. I. to the Rent and Mortgage Interest Restrictions Act,* 1939).

By a lease dated March 24, 1941, landlords demised to a tenant a flat which was a controlled house under the Rent and Mortgage Interest Restrictions Act, 1939, and which had never previously been let. The rent reserved by the lease was 200*l.* per annum. After the counterpart of the lease had been signed by the tenant, the landlords executed a deed by which it was provided that in consideration of the flat being taken in an undecorated condition, the rent would be reduced by 50*l.* per annum during the continuance of the tenancy, making the rent actually payable by the tenant 150*l.* per annum. On an application by the tenant to the county court judge to determine the standard rent of the premises, he fixed it at 150*l*, :—

Held, that the rent at which the dwelling-house was first let within the meaning of s. 12, sub-s. 1 (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 3 and sch. I. to the Rent and Mortgage Interest Restrictions Act, 1939, was conclusively determined by the document creating the letting, that a subsequent variation in the amount of the rent reserved thereby did not alter the effect of the lease, and that the standard rent was, therefore, 200*l.* per annum.

Appeal from West London county court.

By a lease, dated March 24, 1941, the landlords, Richmond Court, Ld., demised to the tenant, D. C. White, a residential flat at Richmond Court, Sloane Street, London, for the term of one year from March 25, 1941, and thereafter from year to year until determined as provided in the lease at a yearly rent of 200*l.* The flat in question was a controlled dwelling-house by virtue of the Rent and Mortgage Interest Restrictions Act, 1939, and had never previously been let. After the counterpart of the lease had been signed by the tenant, the landlords executed a deed under their seal, in the form of a letter addressed to the tenant, in the following terms: "Flat No. 35. Fourth Floor. Richmond Court, Ld., hereby "confirms that the rent of 200*l.* per annum reserved by the "lease dated March 24, 1941, made between the same "Richmond Court, Ld., of the one part and yourself of the "other part of the above mentioned flat shall, in consideration "of the said flat being taken in its present undecorated "condition, be reduced by the sum of 50*l*. per annum during "the continuation of the said lease so that the rent actually "payable by you will be at the rate of 150*l*. per annum." The tenant applied to the county court judge to determine the standard rent of the flat in accordance with s. 12, sub-s. 1 (*a*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 3, sub-s. 1, and sch. I. to the Rent and Mortgage Interest Restrictions Act, 1939 (1). The county court judge fixed the rent at 150*l*. per annum, and the landlords appealed.

Gorman K.C. and *Werninck* for the landlords. The standard rent was 200*l*. and not 150*l*. as found by the county court judge. Under s. 12, sub-s. 1 (*a*), of the Act of 1920 (as amended) the standard rent is fixed by the first letting in the case of a dwelling-house which has not been let before September 1, 1939. Here the first letting was on April 24, 1941, by a lease which reserved a rent of 200*l*. and contained no reference to any other rent. Any other consideration is extraneous to the lease and cannot be regarded so that the court is not entitled to pay regard to the deed by which the reduction was effected in the rent expressed in the lease.

Simes for the tenant. The decision of the county court judge was right. In considering what is the rent attaching to a dwelling-house on the first letting to determine the standard rent the actual obligations of the first tenant to his landlord in respect to the payment of rent must be considered. Regard must be had to the substance of the transaction and the requirements of the Act must not be construed too technically: per Lord Greene M.R. and du Parcq L.J. in *Bryanston Property Co., Ld.* v. *Edwards* (2); a view which was approved in *Tedman* v. *Whicker* (3). In the present case the only obligation

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(1) By Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (as amended by the Act of 1939, s. 3, sub-s. 1, and sch. I.): "For the "purposes of this Act, except "where the contract otherwise "requires:—(*a*) The expression "'standard rent' means the rent "at which the dwelling-house was "let on September 1, 1939, or "when the dwelling-house was not "let on that date, the rent at "which it was last let before that "date, or, in the case of a dwelling-"house which was first let after "the said September 1, the rent "at which it was first let . . . ."

(2) Ante, p. 32, 36.

(3) Ante, p. 112.

C. A.

1944.

White
v.
Richmond
Court, Ld.

of the tenant to the landlords in regard to rent was to pay 150*l*. per annum throughout the continuance of the tenancy. That being so the standard rent was rightly fixed at 150*l*.

Scott L.J. stated the facts, and continued: The county court judge decided that the rent at which the flat was first let in this case was 150*l*. and accordingly fixed the standard rent at that figure. The landlords contend that it should have been fixed at 200*l*. and I agree with that contention. It is to be observed that the lease was completely self-contained and that the deed executed by the landlords on the same day necessarily followed the lease in point of time since it expressed the reduction in the amount of the rent fixed by the lease, the counterpart of which had been signed by the tenant. I agree with the landlords' contention that that concludes the matter. Where rent is fixed by a written document one can only look at that document to see what rent is payable. In my view, the meaning of the phrase in s. 12, sub-s. 1 (*a*), " rent at which the dwelling-house was first let," is conclusively determined by the document which creates the letting and that a subsequent variation does not alter the effect of the lease in regard to the rent at which the dwelling-house was first let. It was argued on behalf of the tenant that the language used by two of the members of the Court of Appeal in *Bryanston Property Co.* v. *Edwards* (1) entitled the tenant to ask the court to take a wider view of the words " the rent at which it was first " let " in the section than that which I have indicated. That case has no direct bearing on the present one, but reliance was particularly placed on a sentence in the judgment of Lord Greene M.R. (2) where he said: " Moreover, in applying " an Act like the Rent Restriction Act to a document of this " kind, I do not think that too much attention should be " paid to technical argument. The Act contemplates the " substance of the obligations of the tenant, and here the " tenant is to pay 190*l*. and no more." du Parcq L.J. agreed that one ought not to be too technical in construing the Act. In my opinion, there is no room for a liberal interpretation of the words of the section in such a case as the present where the terms of the letting are expressed in a lease executed as a deed. The rent here was clearly 200*l*. and that is an end of the matter. The appeal must be allowed.

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(1) Ante, p. 32.

(2) Ibid. 36.

MACKINNON L.J. I agree.

LUXMOORE L.J. I agree.

Appeal allowed.

Solicitors for landlords: *Boyce, Evans & Sheppard.*
Solicitors for tenant: *Glover, Scott & Apthorpe-Webb.*

P. B. D.

HOUNDSDITCH WAREHOUSE CO., LIMITED *v.* WALTEX, LIMITED.

1944
May 4, 5.
Stable J.

Contract—Damages—Mitigation—Sale of goods—Breach of condition as to quality—Offer by defendants to accept return of goods.

The plaintiffs bought from the defendants 300 dozen men's braces which were delivered and paid for. Later, the plaintiffs alleged that the braces did not correspond with sample, and brought an action for damages for breach of contract. After action brought the defendants offered to accept the return of all the braces still in the plaintiffs' possession which, in the opinion of the defendants, were in the same condition as when they were delivered and to return to the plaintiffs the price paid for them. In a subsequent letter the defendants' solicitors wrote that this offer was not made to dispose of the action. The plaintiffs refused the offer on the ground that the production of the braces in court was essential to their case. At the trial of the action the judge found that the bulk of the goods did not correspond with sample and that the defendants' offer was genuine and not merely a tactical manœuvre in the action:—

Held, on the question of damages, that it was not clear whether the offer was one to compromise part of the claim, in which case the plaintiffs were under no obligation to accept it, or one outside the action and without prejudice to the rights of the parties, in which case the plaintiffs ought to have accepted it in mitigation of damages, and in either case had acted unreasonably in refusing it without first obtaining a clear definition of its precise meaning. The amount of the damages to which the plaintiffs would otherwise have been entitled must be reduced accordingly.

ACTION tried by Stable J.

The plaintiffs, Houndsditch Warehouse Co., Ld., were wholesale general warehousemen, and the defendants, Waltex, Ld., were manufacturers of men's leather braces. The plaintiffs agreed, on September 22, 1942, to purchase from the defendants

1944

HOUNDSDITCH WAREHOUSE CO., LD. v WALTEX, LD.

100 dozen and on September 23, 1943, a further 200 dozen of men's braces to correspond with a sample. The defendants delivered the braces and the plaintiffs paid for them. On February 22, 1943, the plaintiffs brought this action claiming damages for breach of contract on the ground that the braces did not correspond with sample or that they contained latent defects which were not visible on a reasonable examination of sample or were of inferior and unmerchantable quality. On March 13, 1943, the defendants' solicitors wrote to the plaintiffs' solicitors stating that, while making no admissions, the defendants " were willing to accept the return of all braces which are " in the same condition as at delivery and refund the amount " paid to them, such return being on the basis that our clients " are to examine the braces and to be entitled to refuse any " which are not in their opinion in the same state as " when delivered." On the plaintiffs' solicitors refusing this offer, the defendants' solicitors, on March 16, wrote that the plaintiffs solicitors had misunderstood the letter of March 13 : " This letter was written to you, not for the purpose of disposing " of the action, but was intended to deal only with the braces in " the possession of your clients of which my clients were willing " to accept the return, on the conditions stated." On March 17 the plaintiffs' solicitors replied : " We regret that we " misunderstood your letter of the 13th inst., and in the " circumstances we cannot advise our clients to agree to your " suggestion until the action is disposed of, for the production of " the goods at court will be essential for our clients' case."

Levy K.C. and *Marcus Grantham* for plaintiffs.
Scott Cairns for defendants.

STABLE J. stated that the bulk of the braces did not correspond with the sample in quality, but, as the plaintiffs, after the lapse of a reasonable time, had retained the goods without intimating to the defendants that they had rejected them, the plaintiffs had lost their right to reject the goods and their remedy lay in damages which he found to be 459*l.* 12*s.* 0*d.* apart from the question whether the plaintiffs had failed to mitigate the damages. He continued : It is not clear to me from the correspondence between the plaintiffs' and the defendants' solicitors after action brought whether the defendants' offer was an offer outside the action and irrespective of the legal rights of the parties, i.e. an offer to buy back, at the

1944

HOUNDSDITCH WAREHOUSE CO., LD. *v.* WALTEX, LD.

Stable J.

contract price, braces which, in their opinion, were in the same condition as at the time of delivery, or whether it was an offer to compromise the plaintiffs' claim for damages in relation to that number of braces, leaving the question of liability for damages open only in relation to the rest of the braces. If it was an offer to compromise part of the claim, in my judgment, the plaintiffs were under no obligation to accept it. If, on the other hand, it was an offer outside the action, without prejudice to the legal rights of the parties, and irrespective of the fact that the writ had been issued, then the plaintiffs ought to have accepted it because of their obligation to mitigate the damages so far as it lay in their power to do so. I think that view is supported by the decision in *Payzu, Ld.* v. *Saunders* (1). As there was some obscurity as to what the offer meant, it is unfortunate that the plaintiffs' solicitors did not keep the negotiations open long enough to obtain a clear definition of its terms. In refusing the offer, lock stock and barrel, as the plaintiffs did by their letter of March 17, 1943, they were not acting reasonably. The evidence has satisfied me that the defendants thought that they had an opportunity of disposing of the braces which, they suggested, should be returned, and that their offer was a genuine offer put forward for sound commercial reasons and not merely a clever tactical manœuvre in the action. It is, of course, possible that, if the nature of the offer had been investigated further, it might have transpired that it was made to compromise a part of the plaintiffs' claim. It is further possible that the defendants might have formed the opinion that all the braces remaining in the plaintiffs' hands were not in the same state as when they were delivered. Had the offer been one to buy out and out the braces remaining in the plaintiffs' hands, the damages would have been mitigated to the extent of some 300*l*. Making the best allowance I can for the factors I have mentioned, I think that the total figure should be reduced by 150*l*. 12*s*. 0*d*., and there will be judgment for the plaintiffs for 309*l*. damages for breach of contract, the braces remaining the property of the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Robert Clayton & Co.*
Solicitors for defendants: *Albert M. Oppenheimer.*

C. G. M.

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(1) [1919] 2 K. B. 581.

1944

Apr. 26, 27.

Viscount Caldecote C.J., Atkinson and Oliver JJ.

JONES *v.* EVANS.

Bastardy—" Single woman "—Wife of soldier serving compulsorily overseas—Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict., c.* 65), *s.* 3.

The wife of a soldier serving compulsorily overseas, who during his absence has committed adultery, which has not been condoned, is a " single woman " within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872, and, therefore, entitled to lay a complaint in bastardy.

Marshall v. *Malcolm* (1917) 82 J. P. 77 distinguished.

Case stated by Flint justices.

At a court of summary jurisdiction on July 17, 1943, a complaint, under the Bastardy Laws Amendment Act, 1872, was preferred by the appellant, Mary Elizabeth Jones, against the respondent, Emlyn Evans, for that she was delivered of a bastard male child on May 18, 1943, of which child she alleged, the respondent was the father. The appellant was the wife of Joseph Thomas Jones, a soldier serving in H.M. Forces, and there were two children of the marriage. Joseph Thomas Jones embarked for overseas on March 21, 1942, had not since returned to this country, and was still serving abroad. The appellant had not been absent from this country since March 21, 1942. Her husband knew of her condition before the child was born, on May 18, 1943, but the appellant continued to draw separation allowance for herself and the two children of the marriage and for a short time she drew an army allowance for the bastard child. Joseph Thomas Jones had taken no steps to stop the allowances paid to his wife, and after he had become aware of her condition he wrote to her a letter in which he stated : " I have decided to forgive you to " a certain extent, until I get the luck to get home." The justices said that since there had been no break in the relations between the appellant and her husband other than an enforced separation which was due to war service, they were not living separate and apart at the date of the complaint, and that, therefore the appellant was not a " single woman " within the meaning of the Bastardy Laws Amendment Act, 1872. Accordingly, they dismissed the complaint, and the appellant appealed.

Graham Brooks for appellant. The justices were wrong. The appellant was a " single woman " within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872. She and her husband were living apart ; she had committed adultery, forfeiting her right to the consortium of her husband; and there had been no condonation by the husband. In *Rex* v. *Luffe* (1) an order of bastardy had been made, under 6 Geo. 2, c. 31, s. 1, on the application of a married woman, the wife of a mariner who was abroad from April 9, 1804, to June 29, 1806, when he returned home and lived with his wife, the child being born on July 13, 1806, and the court upheld the order treating the mother as a " single woman." Again, in *Reg.* v. *Collingwood* (2) an order of bastardy was upheld which had been made under the Poor Law Amendment Act, 1844, and the Bastardy Act, 1845 (s. 2 of the former Act limiting the application to " any single woman "), on the application of " Mary Ann " Rance, wife of George Rance, single woman," although in that case the circumstances of the separation between husband and wife are not set out in the report. In *Reg.* v. *Pilkington, Ex parte Grimes* (3) an order of bastardy was upheld which had been made under the same Acts on the suit of a married woman who was living apart from her husband in that he was a convict under sentence of transportation. These cases show that where a wife is, in fact, living apart from her husband and commits adultery, she is treated as a " single woman " who is entitled to apply for an affiliation order under the Bastardy Acts. [*Keats* v. *Keats and Montezuma* (4); *Marshall* v. *Malcolm* (5) ; and *Rex* v. *Creamer* (6) were also referred to.]

Herbert Malone for respondent. The justices came to a correct decision. The fact that a husband is overseas, not of his own volition, whether or not on government service, in no way destroys the consortium of husband and wife. It still exists until, in consequence of the act of one or other of them, the other spouse exercises his or her right to put an end to it. There was here no decree, no order of the court, no agreement for separation and no desertion. In *Marshall* v. *Malcolm* (5) it was held that a wife was not living apart from her husband while he was at sea, and, therefore, was not a " single woman." In the words of Darling J. in that case : " It is a complete

(1) (1807) 8 East, 193.
(2) (1848) 12 Q. B. 681.
(3) (1853) 2 E. & B. 546.
(4) (1859) 1 Sw. & Tr. 334; 28 L.J. (P. & M.) 57.
(5) (1917) 82 J. P. 77.
(6) [1919] 1 K. B. 564.

1944

JONES
v.
EVANS.

" misuse of language to say that this woman was living apart " or separate from her husband "(1). If that decision is right it is impossible to hold that the appellant was, at the time of the application, living apart from her husband. In *Rex* v. *Luffe* (2) there was no suggestion that the husband was overseas compulsorily, and when a man is overseas voluntarily by virtue of his business or employment the relationship of husband and wife may not continue to exist. A married woman who, at the date of the application for an affiliation order, is living with her husband cannot obtain an order: *Stacey* v. *Lintell* (3); *Tozer* v. *Lake* (4); *Boyce* v. *Cox* (5); and *Jones* v. *Davies* (6). The test is: What is the status of the appellant at the date of the application? In the present case the appellant at that time was a married woman not living separate and apart from her husband. She still had the right to the consortium of her husband. It had not been determined. Her husband had not terminated the allowances to his wife, although he might have done so. *Reg.* v. *Pilkington, Ex parte Grimes* (7), was in conflict with the earlier authorities and was wrongly decided.

Graham Brooks replied.

ATKINSON J. delivered the following judgment of the court. There is no doubt that there are circumstances in which a married woman is a " single woman " for the purpose of s. 3 of the Bastardy Laws Amendment Act, 1872. Two propositions are well established. A married woman who is living with her husband at the date of an application for an order of affiliation is not a " single woman " and a married woman, who is not living with her husband at the date of the application may be a " single woman." The contest here is as to what is meant by a wife living or not living with her husband. The appellant contends that if, in fact, the husband and wife are not living together, whatever the reason may be, the wife is a " single woman," at any rate, if she has been guilty of adultery which has not been condoned and has thereby lost her legal right to maintenance and the consortium of her husband. The respondent contends that it is only a separation resulting from a decree or order or agreement, or desertion, which amounts to " not living together " within the meaning of the cases.

(1) 82 J. P. 78.
(2) 8 East, 193.
(3) (1878) 4 Q. B. D. 291.
(4) (1879) 4 C. P. D. 322.
(5) [1922] 1 K. B. 149.
(6) [1901] 1 K. B. 118.
(7) 2 E. & B. 546.

It is, of course, not suggested that it can be said that a husband and wife are not, in fact, living together merely because of some short temporary absence from home of one of them, but in the present case it is clear that the appellant was not, in fact, living with her husband on July 17, 1943, the date on which she preferred her application, that she had not lived with him for sixteen months and had no prospect of living with him in the near future, that she was drawing army allowances on the basis of separation, and that she had committed a matrimonial offence,, uncondoned, which entitled her husband to refuse to resume cohabitation and further to maintain her. The importance of this point was emphasized by Littledale J., in *Rex* v. *Flintan* (1) when he said : " Having rendered herself " unworthy of her husband's protection, she returns to the " same state as if she were not married."

There are a number of relevant cases. In *Rex* v. *Luffe* (2) the application was made under 6 Geo. 2, c. 31, s. 1, " an act " for the relief of parishes and other places from such charges " as may arise from bastard children born within the same." The Act was confined to cases where " any single woman shall " be delivered of a bastard child." In that case an order had been made filiating the child of a married woman, who had given birth to a child on July 13, 1806, her husband having been beyond the seas since April 9, 1804, and she not seeing her husband and not having access to him from that date to June 29, 1806, when he returned home. The order on the application was made on August 20, 1806 when, although it is not so stated, presumably the husband was again at sea or at any rate not living with his wife. It was not suggested in that case that the woman could not be considered as a single woman because her husband was beyond the seas by reason only of his calling, which is the contention put forward in the present case by the respondent. The court upheld the order. In *Reg.* v. *Collingwood* (3) the facts are not fully stated. A rule had been obtained to remove into the Court of Queen's Bench an order made on a bastardy summons under the Poor Law Amendment Act, 1844, and the Bastardy Act, 1845, against the putative father to pay to the mother of the bastard child the sum of 1*s*. 6*d*. per week " until the said child shall attain the age of " thirteen years or shall die or the said George Rance " [the husband of the mother] " shall again live and cohabit with his

(1) (1830) 1 B. & Ad. 230.
(2) 8 East, 193.
(3) 12 Q. B. 681.

"said wife." Section 2 of the Poor Law Amendment Act, 1844, upon which the Bastardy Act, 1845, was founded, speaks only of "any single woman who may be with child or who may be "delivered of a bastard child," but the rule was discharged although the mother of the bastard child was a married woman. Lord Denman C.J. said :—"The single question is whether a "*married woman*, becoming the mother of an illegitimate child, "is within the Act of 7 & 8 Vict., c. 101., which authorizes "the justices to make an order of bastardy. The language of "the statute applies in terms only to single women : so did "the language of stat. 6 G. 2. c. 31 ; yet Lord Ellenborough "and the whole court, in *Rex* v. *Luffe* (1) held that an order might "be made on the putative father of the bastard child of a "married woman, who was to be considered single under the "existing circumstances and for that purpose. The Act last "named is repealed, indeed, by that now in force ; but the "authority and the reason of the decision remains unimpaired ; "and the law, differently interpreted, would fail to reach a very "large proportion of illegitimate children. We, therefore, "think that we must hold this order good." Beyond the fact of separation it is not clear from the report what were the circumstances of the mother of the child as regards her husband. In *Reg.* v. *Pilkington, Ex parte Grimes* (2) an order of maintenance was upheld which had been made by justices on the putative father of a bastard child born of a married woman whose husband had been absent under sentence of transportation in Van Diemen's Land for several years. There was no separation here between husband and wife by operation of law, that is by decree, or by agreement. The husband was away from his wife, not voluntarily, but by reason of his sentence. Lord Campbell C.J., in giving judgment, referred to *Rex* v. *Luffe* (1) saying that (3) : "the same "interpretation was put by this court on the word [single] "as used in the earlier statute ; and it was held that a "married woman may, under such circumstances as these, "be considered single in the sense intended by a statute "which provides for the maintenance of bastards." "We "are not," said Lord Campbell, "absolutely bound by that "decision : but we should adhere to it unless very strong reasons "were adduced against it." Justices had refused to grant a distress warrant under the bastardy order on the ground that

(1) 8 East, 193.

(2) 2 E. & B. 546.

(3) Ibid. 552.

the husband had returned from his sentence about five years after the date of the bastardy order and cohabited again with his wife but had left her after about six weeks and was never heard of again. Lord Campbell said (1): "As to "the husband's return, in *Reg.* v. *Collingwood* (2) the decision "was on general grounds: it did not appear that the husband "was suffering transportation: he might have been in Scotland, "or in England indeed, if he had not access to his wife. The "liability of the putative father, in this case, cannot, therefore, "be affected by the return of the husband from transportation." In *Stacey* v. *Lintell* (3) and *Tozer* v. *Lake* (4), it was held that an application for a bastardy order under the Bastardy Laws Amendment Act, 1872, ss. 3 and 4, could not be made when the mother had married since the birth of the bastard child and was living with her husband at the time of the application. In *Jones* v. *Davies* (5) Hannah Jones was a married woman living with her husband, a seafaring man. He was away from home from February 23, 1899, to July 6, 1899, and on his return became aware of his wife's pregnancy. He continued to cohabit with her for three weeks when he again went to sea, returning in September, 1899, for a short period when he again cohabited with her. He returned again on January 27, 1900, after the birth of the child on December 3, 1899, and cohabited with his wife until February 7, 1900, when, being advised by a solicitor acting for his wife that she should be living apart from her husband so that she might obtain an affiliation order, he separated from her and went to reside in another part of the county. The wife then applied for a summons against Davies. The justices found that the separation was colourable and for the purposes of the proceedings only and that the husband intended to cohabit with his wife when the proceedings were over, and they dismissed the information, but stated a case. Their view was upheld by a Divisional Court. Lawrance J. said (6): "I base my judgment on "the short and simple ground that in no case has it been shewn "that a married woman, who is living with her husband at the "time the application is made, can be treated as being a single "woman. No doubt the expression 'single woman' in the "Bastardy Acts caused some difficulty at first, but the courts "got over that difficulty by deciding that a married woman

(1) 2 E. & B. 553.
(2) 12 Q. B. 681.
(3) 4 Q. B. D. 291.
(4) 4 C.P.D. 322.
(5) [1901] 1 K. B. 118.
(6) Ibid. 120.

1944

JONES
v.
EVANS.

"who was living apart from her husband might be treated "as a single woman, but there is no case where she has been so "treated whilst she is living with her husband . . . . . the "magistrates found as a fact that this separation was only "colourable, and I think that they came to a right conclusion." Kennedy J. said (1): "The point that we have to decide is "whether the magistrates having found conclusively—and as "I think rightly—that the husband and wife were, in fact, "living together, the woman can, under such circumstances, "obtain an affiliation order against another man, assuming of "course, that that man is proved to be the father of the child. "The section under which the application was made in terms "relates to a 'single woman,' and prima facie, therefore, this "woman could not make such an application because she was "not within that category; but there are a number of authorities, by which we are bound, which shew that the word "'single' may be so far neglected as to warrant an application "by a woman who has, in fact, been married, and who, "therefore, has the status of a married woman, but who "at the time the application is made, is not living with her "husband . . . . So far as the decisions to which I have "alluded are concerned, they are all cases in which at the time "of the application the woman making it was in fact living "separate from her husband, and in which the husband might "have said that she had rendered herself unworthy of her "husband's protection and had lost her title to maintenance in "his home, and, therefore, as was said by Littledale J., in "*Rex* v. *Flintan* (2) she returns to the same state as if she were "not married. The case of *Rex* v. *Luffe* (3) is a case of that "character, since I understand from the report that the applicant "in that case was not living with her husband at the time of the "application," and he then referred to *Reg.* v. *Collingwood* (4) and *Reg* v. *Pilkington, Ex parte Grimes* (5). It is clear that Lawrence and Kennedy JJ., when speaking of a wife living apart from her husband, meant, in fact, living apart from her husband and were not intending to limit the rule to be derived from the earlier cases.

In our opinion *Jones* v. *Davies* (6) is not in conflict with the earlier authorities, as urged for the defendant, but in line with them. The only case which creates any difficulty, is that of

(1) [1901] 1 K. B. 121.
(2) 1 B. & Ad. 230.
(3) 8 East, 193.
(4) 12 Q. B., 681.
(5) 2 E. & B., 546.
(6) [1901] 1 K. B. 118.

Marshall v. *Malcolm* (1) in which the respondent was married in 1914 and lived with her husband till December of that year, when he had to join the Navy, as he was in the naval reserve. Between that date and August, 1916, he never had access to his wife. In March, 1916, the respondent gave birth to a child. On learning of this occurrence the husband stopped payment of his allotment, but in August, 1916, he came home for a week on leave, forgave his wife, and lived with her. He then returned to his ship and payment of his allotment was resumed. In July, 1917, the respondent summoned the appellant as being the father of the child and the justices made an order on him for its maintenance. It was held that the respondent was not living separate and apart from her husband while he was at sea, and, therefore, she could not be deemed to be a " single woman " within s. 3 of the Bastardy Laws Amendment Act, 1872, and the order was set aside. The respondent did not appear, and, therefore, the case was not argued, nor was the attention of the Court called to *Rex* v. *Luffe* (2) and *Reg* v. *Collingwood* (3), Darling J. said (4) : " The material date to look at in deciding " whether she was to be deemed a single woman within the " meaning of the Act is the date of the application . . . . " Although, in fact married she might, for the purposes of the " Act, be treated as a single woman in certain circumstances. . . . . " It is a complete misuse of language to say that this woman was " living apart or separate from her husband. A wife is not " living apart and separate from her husband merely because " he is absent on a journey . . . . The magistrates have " decided this case in a manner contrary to authority. They " decided that a woman, who was living with her husband, " as much as the wife of a soldier or sailor can live with him, " when he is on active service, was living separate and apart " from her husband." As I have stated, that case was not argued. It is enough to say that there had been clear condonation and that is sufficient to distinguish it from the present case. The letter written by the husband in the present case did not amount to condonation : see *Keats* v. *Keats and Montezuma* (5). The importance of that distinction receives support from a passage in *Rex* v. *Creamer* (6) where the question whether the accused could be guilty of receiving property stolen by a wife from her husband depended on whether the husband and wife were living together. Darling J. said (1): "In determining "whether a husband and wife are living together the law has "regard to what is called the consortium of husband and wife, "which is a kind of association only possible between husband "and wife. A husband and wife are living together, not only "when they are residing together in the same house, but also "when they are living in different places, even if they are "separated by the high seas, provided the consortium has not "been determined. In this case it cannot be said that at the "time the wife took the money the consortium had been "determined, because the wife had not at that time committed adultery, and therefore it is little to the purpose to "point to the fact that the wife was living at Folkestone and "the husband was in France on service with the Army. In "the legal sense they were still living together."

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(1) 82 J. P. 77.
(2) 8 East 193.
(3) 12 Q. B. 681.
(4) 82 J. P. 78.
(5) 1 Sw. & Tr. 334 ; 28 L. J. (P. & M.) 57.
(6) [1919] 1 K. B. 564.

In our view the facts in the present case constituted the appellant a "single woman." There was a de facto separation of considerable length and an uncondoned matrimonial offence which had lost for the complainant her title to maintenance by her husband and her right to live with him. The appeal, therefore, succeeds. In our judgment, the justices have taken a wrong view of the law and the case must go back to them that they may consider whether it is proved that the respondent is the father of the appellant's child.

Appeal allowed.

Solicitors for appellant: *J. Kerfoot-Roberts and Son, Holywell.*

Solicitors for respondent: *Field, Roscoe & Co., for Isaac Edwards and Owens, Rhyl.*

C. G. M.

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(1) [1919] 1 K.B. 569.

HOLMAN *v.* GEORGE ELLIOT AND COMPANY, LIMITED.

C. A.

1944.

May 2.

MacKinnon L.J. and Morton J.

Practice—Writ—Service—Failure to serve within twelve months—Writ rendered void—Extension of validity of writ—Discretion of court—R. S. C., Or. 8, *r.* 1 ; *Or.* 64, *r.* 7.

In proceedings for damages for a fatal accident under Lord Campbell's Act a writ was issued within twelve months of the day of the accident as required by s. 3 of the Act, but it was not served within twelve months from the day of its date as provided by R. S. C., Or. 8, r. 1, and, therefore, ceased to be in force. On a subsequent application by the plaintiff, Stable J. extended the validity of the writ for six months under Or. 64, r. 7. On appeal :—

Held, that, as s. 3 of Lord Campbell's Act had been complied with, Stable J. had only granted relief in respect of a failure to comply in time with a procedural requirement, and that he had a discretion under Or. 64, r. 7, to extend the writ, which he had rightly exercised.

There is no rule depriving a judge of his discretion to extend the time in such a case, although there is an accepted practice, as laid down in *Doyle* v. *Kaufman* (1877) 3 Q. B. D. 7, not " to " extend the time for renewing a writ of summons when " the claim would, in the absence of such renewal, be barred by " the Statute of Limitations."

APPEAL from Stable J.

On October 9, 1941, Lionel Edwin Holmes met with a fatal accident while in the employment of the defendants, George Elliot & Co., Ld. On October 7, 1942, the plaintiff, Florence Louisa Holman, who was the mother of the deceased workman, commenced proceedings against the defendants by the issue of a writ claiming damages (1.) as a dependant of the deceased under the Fatal Accidents Acts for his death by reason of the defendants' negligence, and (2.) as personal representative of the deceased under the Law Reform (Miscellaneous Provisions) Act, 1934, for his injuries and death. The writ was not served by the solicitors who were then acting for the plaintiff until October 7, 1943, some hours after the end of a year from its issue, and on October 20, 1943, the defendants issued a summons to have the writ set aside for failure to serve it within twelve months of its issue as required by R. S. C., Or. 8, r. 1, (1).

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(1) By R. S. C., Or. 8, r. 1 : " No " original writ of summons shall " be in force for more than " twelve months from the day of " the date thereof, including the " day of such date ; but if any " defendant therein named shall " not have been served therewith, " the plaintiff may, before the " expiration of the twelve months, " apply to the court or a judge for " leave to renew the writ ; and

C. A.
1944

HOLMAN
v.
GEORGE
ELLIOT &
CO., LD.

On November 1, 1943, Master Moseley made the order asked for, and the plaintiff by her present solicitors brought proceedings asking for the writ to be extended so as to enable it to be served on the defendants. Master Mosely dismissed the application, but, on appeal, Stable J., in exercise of the power conferred by Or. 64, r. 7 (1), extended the validity of the writ for six months. The defendants appealed.

A. D. Karmel for the defendants. Stable J. ought not to have extended the validity of the writ. The writ had been rendered void under Or. 8, r. 1, by reason of the failure to serve it within twelve months and there was no application under that rule for its renewal before the twelve months had expired. It is true that in the ordinary way a writ can be extended after the twelve months has expired under Or. 64, r. 7, but such a renewal will not be granted when, but for the renewal, the claim would be statute-barred: *Doyle* v. *Kaufman* (2); *Hewett* v. *Barr* (3): see also *Smalpage* v. *Tonge* (4). As an action for damages for fatal accidents under Lord Campbell's Act (Fatal Accidents Act, 1846), s. 3, must be brought within twelve months of the date of the accident, the expiry of the writ caused the claim to be statute-barred. The court will not allow an extension where otherwise the right of action would be defeated: *Mabro* v. *Eagle Star and British Dominions Insurance Co.* (5).

Fox-Andrews for the plaintiff. The writ in this case was issued before the expiration of a year from the date of the accident, and, therefore, the requirement of Lord Campbell's Act was complied with. It is true that through what amounted to the negligence of the plaintiff's then solicitors the writ was not served within twelve months as required by Or. 8, r. 1, and what Stable J. did was to give relief for failure to comply with a

" the court or judge if satisfied " that reasonable efforts have been " made to serve such defendant " or for other good reasons may " order that the original . . . . " writ of summons be renewed for " six months."

By Or. 64, r. 7: " The court or " a judge shall have power to " enlarge or abridge the time " appointed by these rules . . . . " for doing any act or taking any " proceedings, upon such terms " (if any) as the justice of the " case may require, and any such " enlargement may be ordered " although application for the " same is not made until after the " expiration of the time appointed " or allowed . . . ."

(2) (1877) 3 Q. B. D. 7, 340.

(3) [1891] 1 Q. B. 98.

(4) (1886) 17 Q. B. D. 644

(5) [1932] 1 K. B. 485.

procedural requirement in exercise of the discretion given to him by Or. 64, r. 7. His order did not revive a statute-barred claim for the requirement of the statute had been fulfilled and he had a clear discretion to extend the validity of the writ: see *Mabro* v. *Eagle Star and British Dominions Insurance Co.* (1). So far back as *Culverwell* v. *Nugee* (2) it was recognized that the court had power to amend its own procedure: see also *Cornish* v. *Hockin* (3).

Karmel replied.

MacKinnon L.J. Mr. Karmel, for the defendants, has argued that Stable J. was wrong in making an order extending the validity of the writ and he relies on several old cases which, he says, lay down the rule that, where an extension of time would have the effect of depriving a defendant of an accrued defence under a statute of limitations or its equivalent, such an extension ought not to be allowed. In particular, he relies on the decision of the Queen's Bench Division, confirmed by the Court of Appeal, in *Doyle* v. *Kaufman* (4). The headnote in that case says: " The court has no power under Or. 57, r. 6 " —which is the equivalent of what is now Or. 64, r. 7—" to " extend the time for renewing a writ of summons where the " claim would, in the absence of such renewal, be barred by the " Statute of Limitations." Mr. Fox-Andrews, for the plaintiff, points out, and I think with reason, that this is not a case where the order of the learned judge, in extending the period for the service of the writ, deprives the defendants of an accrued right of defence under Lord Campbell's Act. The right of defence by the limitations section of Lord Campbell's Act would arise if the writ had not been issued before October 9, 1942. It was in fact, issued on October 7, 1942, two days before the expiry of the twelve months from the date of the accident.

The only questions are, first, whether there is a discretion in the court under Or. 64, r. 7, to enlarge the time fixed for the validity of a writ under Or. 8, r. 1, and, secondly, if there is such a discretion, whether the learned judge exercised it rightly. I think it is not accurate to say that *Doyle* v. *Kaufman* (4) laid down as a settled rule that the court had no power to extend the time within the rule. In my view, the true view is, as was indicated by Kay L.J. in *Hewett* v. *Barr* (5), that there is discretion in appropriate circumstances, though, no doubt, *Doyle* v. *Kaufman* (1) points out circumstances in which it would be wrong for the court to exercise that discretion in favour of an applicant. That there is such a discretion has been recognized in subsequent cases, such as *Mabro* v. *Eagle Star and British Dominion Insurance Company, Ld.* (2), where again this rule about depriving a defendant of an accrued defence under the Statute of Limitations was relied on as a reason why no order should be made. Greer L.J. sums up the matter at the end of his judgment by saying: "Whether the matter is one "of discretion or not, it appears to me inconceivable that we "should make an order which would have the effect I have "mentioned"—the effect, that is, that the defendant would be deprived of the benefit of the Statute of Limitations—"It has "been the accepted practice for a long time that amendments "which would deprive a party of a vested right ought not to "be allowed."

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(1) [1932] 1 K. B. 485.
(2) (1846) 15 M. & W. 559.
(3) (1853) 1 E. & B. 602.
(4) 3 Q. B. D. 7.
(5) [1891] 1 Q. B. 98.

In my opinion, there is no rule that the court or a judge is deprived of any discretion to allow such an extension of time as is involved in this case, but there has been an accepted practice for a long time not to exercise that discretion in such circumstances as were dealt with in *Doyle* v. *Kaufman* (1). In the present case, as I have said, the obligation under Lord Campbell's Act to issue the writ within twelve months of the date of the accident had been complied with, and by that issue of the writ, if it had been served in proper time, the defendants would have ceased to be in a position to rely on that limitation. All that has happened is that, owing to lamentable neglect on the part of the managing clerk of the solicitors then acting for the plaintiff, a day over the twelve months was allowed to elapse before he served the writ. In those circumstances, I think, there was a discretion on the part of the learned judge to make the order extending the time, and, in all the circumstances of the case, that is an exercise of his discretion which I think was perfectly right and proper and with which I certainly should not interfere. In the result, this appeal fails and should be dismissed, with costs.

MORTON J.: I agree. So far as I personally am concerned, I think the vital question in this case is: Had Stable J. a discretion to make the order appealed from? The wording of Or. 64, r. 7, is extremely wide. So far as material it says:

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(1) 3 Q. B. D. 7.

(2) [1932] 1 K. B. 485.

C. A.

1944

HOLMAN *v.* GEORGE ELLIOT & CO., LD.

Morton J.

"The court or a judge shall have power to enlarge or abridge the "time appointed by these rules . . . . for doing any act or "taking any proceeding upon such terms (if any) as the justice "of the case may require and any such enlargement may be "ordered although application for the same is not made "until after the expiration of the time appointed or allowed." For the reasons already given by my Lord, I am satisfied that the learned judge had a discretion under that rule which he could exercise in the present case. I observe that in *Hewett* v. *Barr* (1), in addition to the observation of Kay L.J. to which reference has been made by my Lord, Lord Esher commences his judgment by saying: "It has been laid down, in "*Weldon* v. *Neal* (2), as a general rule of conduct, with "regard to the granting of amendments, that they ought "not to be granted where they would have the effect of "altering the existing rights of the parties. This being the "rule with regard to amendments of pleadings, the same "principle applies still more strongly to the case where we are "asked to allow the renewal of a writ, though by so doing we "should deprive the defendant of his existing right to the benefit of the Statute of Limitations." Lopes L.J., after referring to *Doyle* v. *Kaufman* (3), ends by saying: "In my experience "the practice as laid down in that case has been followed "ever since." I do not think that any of the members of the Court of Appeal in *Hewett* v. *Barr* (1) intended to exclude the exercise of the discretion under Or. 64, r. 7, in such a case as the one now before us. There being, in my view, a discretion, I respectfully agree that there is no reason for interfering with the exercise of his discretion by Stable J., and, indeed, I should certainly have exercised it in the same way myself.

Appeal dismissed.

Solicitors: *Watson, Sons & Room for Allen Pratt & Geldard, Cardiff; Gibson & Weldon for John Whittle, Robinson & Bailey, Manchester.*

(1) [1891] 1 Q. B. 98.
(2) (1887) 19 Q. B. D. 394.
(3) 3 Q. B. D. 7.

H. C. G.

1944
April 4.
Tucker J.

RODWELL *v.* THOMAS AND OTHERS.

Master and servant—Wrongful dismissal—Crown civil servant—Disciplinary charge—Dismissal—Inclusion in contract of service of procedure approved by joint committee of National Whitley Council—Prerogative of Crown to dismiss at pleasure.

With a Treasury Circular, an extract from the report of a joint committee of the National Council for the Administrative and Legal Departments of the Civil Service (the National Whitley Council), was sent to all departments of the civil service. In that extract it was stated that the joint committee had approved certain procedure, including, in appropriate cases, an inquiry by a departmental domestic tribunal, where a serious disciplinary charge, other than one which might give rise to criminal proceedings, was brought against an established civil servant. A serious disciplinary charge which might give rise to criminal proceedings was brought against the plaintiff, an established civil servant. The procedure adopted was, in substance, that approved by the report of the joint committee for a case other than that which might give rise to criminal proceedings. After an oral hearing by a departmental domestic tribunal, the plaintiff was dismissed from the civil service. In an action by the plaintiff for wrongful dismissal :—

Held, (1.) that, assuming that the provisions as to procedure at an inquiry approved by the joint committee became terms of the plaintiff's contract of employment, there had been no breach of those terms ; but that (2.) it had not been established that those provisions formed a part of the plaintiff's contract of employment ; and (3.) had that been established, the provisions would have been invalid as being a clog on the prerogative of the Crown to dismiss an established civil servant at pleasure.

ACTION tried by Tucker J.

The plaintiff, Walter Thomas Rodwell, was an established civil servant, employed by the Tithe Redemption Commission. In June, 1940, he was "lent" to the Air Ministry. He returned to the commission on January 18, 1943, when an accusation was made against him that, while at the Air Ministry, he had been guilty of grave misconduct in that on May 19, 1942, he had sold a radio set, the property of the Air Ministry, and he was suspended from duty. On February 19, 1943, an inquiry into the charge was held at the office of the Tithe Redemption Commission, the procedure adopted being that approved by a joint committee of the National Council for the Administrative and Legal Departments of the Civil Service (the National Whitley Council) in

1944

RODWELL
v.
THOMAS.

the case of a serious disciplinary charge (other than one which might give rise to criminal proceedings). The plaintiff was assisted in the presentation of his case, which was a denial that he had sold the radio set, by Mr. G. F. Green, the assistant secretary of the Civil Service Clerical Association, of which the plaintiff was a member. On February 22, 1943, the commission wrote to the plaintiff a letter in which they said that they had come to the conclusion that the charge of grave misconduct had been made out, that they had no alternative but to dispense with his services, and that no salary would be paid to him from the date of his suspension on January 18, 1943.

On May 22, 1935, the Treasury had circulated to all departments of the Civil Service the following letter (Treasury Circular No. 12/35): " Sir, I am directed by the Lords Com-" missioners of His Majesty's Treasury to transmit herewith " an extract from the report of a joint committee of the " National Council for the Administrative and Legal Depart-" ments of the Civil Service (committee 'C') which was " appointed to consider certain matters dealt with in the " Report of the Royal Commission on the Civil Service 1929–31 " (Cmd. 3909 of 1931). It will be observed that the report, " while recommending certain principles of procedure for " dealing with serious disciplinary charges makes it clear " that the responsibility of heads of departments in this " matter is unimpaired and that any existing right of ultimate " appeal to the head of a department is unaffected. My " Lords suggest that the procedure outlined in the attached " extract should, as far as practicable, be followed in dealing " with serious disciplinary charges (other than charges which " may give rise to criminal proceedings) against established " civil servants." The extract from the report of the Joint Committee, enclosed in this letter, was in these terms:— " We have noted paras. 598–601 of the Report of the Royal " Commission. As regards the recommendations in paras. 602-3 " of their report on the subject of the procedure to be followed " in cases where a serious disciplinary charge is brought against " an established civil servant, e.g. where the penalty may be dis-" missal, the committee agree to the adoption of the following " procedure :—(*a*) when a charge of this kind (other than one " which may give rise to criminal proceedings) is brought " against an officer he should be given in advance a written " statement defining the charge and setting out particulars "of the facts relied upon to support the charge; (*b*) the "officer should be required to submit a written reply to "the charge made against him, but, in cases where there is "a conflict of evidence between the charge and the officer's "written reply, the officer may, if he so desires, represent his "case orally; (*c*) the officer, in such circumstances, will have "the right to represent his case orally before a suitable officer "of his department other than his immediate superior. In "the case of departments with large provincial staffs, this "officer would necessarily often be a local officer and not an "officer from headquarters; (*d*) in representing his case orally "the officer should be allowed, if he so desires, to have the "assistance of a friend or colleague (who may be an Association "representative) present with him." The document continued:—"We appreciate that undue formality is undesirable "in conducting these enquiries and that no one standardised "practice would be applicable in all cases. We also desire "to make it clear that, in recommending the above principles "of procedure, we have no intention of impairing the responsibility of heads of departments in dealing with "disciplinary questions or of affecting any existing right of "ultimate appeal to the head of a department."

The plaintiff brought this action for damages for wrongful dismissal against the Tithe Redemption Commission as such, and against its members personally, alleging that his employment had been wrongfully terminated in view of the procedure followed at the inquiry. He pleaded that "it was a term of the plaintiff's employment with "the Tithe Redemption Commission as set out in the "enclosure to the Treasury Circular, No. 12/35, that, if any "serious disciplinary charge were brought against him, which "was of a kind which might give rise to criminal proceedings, "then the Tithe Redemption Commission was not entitled to "adopt any procedure of its own to investigate such charge." By his particulars, he pleaded: "The term alleged was "expressly agreed orally as a term or condition of employment "between the representatives of the Crown and of His "Majesty's Treasury and the duly appointed representatives of "the staff, on behalf of the plaintiff (as an established civil "servant) at a meeting of the National Whitley Council "held on or about March 8, 1935, and of which council the "said representatives are members." The plaintiff also asked for an injunction restraining the defendants from acting on the enclosure to the Treasury Circular No. 12/35 and from acting on a pretended presentation and hearing of a case against the plaintiff on February 19, 1943, and a pretended consideration thereof on or before February 22, 1943, and the pretended termination of the plaintiff's appointment by the letter of that date. He also claimed a declaration that the charge was one which might give rise to criminal proceedings, that the pretended presentation of the charge and hearing of the case held by the commission on February 19, 1943, was irregular and invalid and contrary to the provisions of the Treasury Circular and its enclosure, and was not binding on the plaintiff, and that the defendants and each of them were not entitled to dismiss the plaintiff from his employment.

Platts Mills for the plaintiff. The plaintiff was accused of a crime and by the terms of his contract of employment he could not be brought before a departmental domestic tribunal on such a charge. No doubt, the Crown can dismiss an established civil servant at any time, but it cannot dismiss him by virtue of an irregular procedure and in breach of the contract of employment made with him. The plaintiff's dismissal was the result of the decision of a departmental domestic tribunal as appears from the letter of February 22, 1943, sent to him. The provisions as to procedure, approved by the joint committee of the National Whitley Council on which the staff of the civil service is represented, form a part of the plaintiff's contract of employment. By the report of the joint committee, it is clear that in the case of a serious disciplinary charge, which might give rise to criminal proceedings, the department cannot adopt the procedure of a departmental domestic tribunal This action lies against the Tithe Redemption Commission as well as against its individual members. See the Tithe Act, 1936, sched. II., par. 8, *Graham* v. *H.M. Commissioners of Public Works and Buildings* (1) and *Minister of Supply* v. *British Thomson-Houston Co., Ld.* (2).

Valentine Holmes for the defendants. On the assumption that the provisions as to procedure approved by a joint committee of the Whitley Council formed a part of the plaintiff's contract of employment, there has been no breach of such provisions. The report provides for a departmental domestic tribunal for the investigation of a serious disciplinary charge (other than one of crime) where the penalty might be dismissal,

(1) [1901] 2 K. B. 781.

(2) [1943] 1 All E. R. 615.

but no provision is made for the procedure where the serious disciplinary charge made is one of crime. It cannot be suggested that the department is bound to prosecute. The procedure is left to the discretion of the department, and, if the department considers that it is fair that such a charge should be considered by a departmental domestic tribunal, there is no prohibition of it. In any case, however, the plaintiff has not proved that the provisions as to procedure approved by the joint committee formed part of his contract of employment. Such a term in the contract would be contrary to public policy as an interference and clog on the prerogative right of the Crown to dismiss an established civil servant at any time: *Dunn* v. *The Queen* (1); *Denning* v. *Secretary of State for India in Council* (2)

Platts Mills replied.

TUCKER J. The first-named defendant Sir Charles J. Howell Thomas has died since these proceedings started and his name must be struck from the record. The result of this Treasury Circular containing the recommendations or agreed finding of a joint committee of the National Whitley Council for the Civil Service appears to be that a specific form of procedure is laid down in cases where a serious disciplinary charge, other than one which may give rise to criminal proceedings, is brought against an established civil servant, e.g. where the penalty may be dismissal, but there is no recommendation laid down as to what is to be the appropriate procedure for dealing with charges which may give rise to criminal proceedings. It is conceded by Mr. Platts Mills that an established civil servant can be dismissed at any time at the pleasure of the Crown and that he has no remedy for such a dismissal, whatever the grounds may be which have brought it about. That being the position, where it is proposed to dispense with the services of a civil servant forthwith or there are facts likely to bring about that result, even if they may involve a criminal charge, none the less, it is only fair, right, and reasonable that the civil servant should be given some opportunity of presenting his side of the case before action is taken. No one suggests that in such a case the alleged offender must always be prosecuted, and, as the joint committee of the National Whitley Council and the Treasury are silent as to what is the procedure to be followed in such cases, it seems to me to rest with the discretion of the

(1) [1896] 1 Q. B. 116. (2) (1920) 37 T. L. R. 138.

authorities in any particular case as to what method they will adopt to give a man a reasonable opportunity of presenting his case. I fail to see how it can be said that, if they adopt the procedure laid down by the finding of the joint committee, framed, it is true, to meet a different type of case, that is a breach of contract. Assuming for the moment that the contents of the report of the joint committee form part of the contract between the plaintiff and the Tithe Redemption Commission, I cannot read into the terms of that contract any provision that the procedure followed may not be adopted and used to meet other cases than those for which it was framed, if the department considers it fair to make some inquiry. The plaintiff's case, therefore, fails at the outset because even on the assumption that the provisions of this report are to be regarded as contractual, I am unable to see that there has been any breach of them by the defendants.

Having regard, however, to the argument addressed to me by Mr. Platts Mills, I think that it is only right to consider whether the contents of the report can be considered to form part of the contract between the plaintiff and the defendants. By the word " contract," I mean a " legally binding contract " which would give the plaintiff a right of access to a court of law to enforce compliance with its provisions. I have not been shown any written contract which established the terms of the plaintiff's employment, but it is said that because members of the trade union which represents him have been parties to this report of the joint committee he has the right to come to a court of law and say : " Every one of the findings of this " committee must be considered as part of the terms of my " contract of employment for breach of which I am entitled to " seek redress." It is well-known that it has been found convenient to settle questions relating to conditions of employment through the medium of a representative body such as the joint committee, but I am at a loss to understand how every matter which is disposed of by give and take in that way can be said to be incorporated into a civil servant's contract of employment, so that, on a deviation from any term or condition, there is a breach of contract affording him a cause of action. In my opinion, Mr. Platts Mills has failed to get within measurable distance of establishing that the recommendations of the joint committee enclosed with the Treasury Circular No. 12/35 form part of the plaintiff's contract of employment with the Tithe Redemption Commission.

There is a further difficulty in the plaintiff's way. The authorities show, not only that prima facie an established civil servant can be dismissed at pleasure, but that the court will disregard any term of his contract expressly providing for employment for a specified time or that his employment can only be terminated in specified ways. The court regards such a provision in a contract as a clog on the right of the Crown to dismiss at pleasure at any time. This action, being one which, in substance, seeks to establish that the plaintiff has been wrongfully dismissed because the procedure adopted at the inquiry was wrong and, therefore, ineffective legally to terminate his employment, in my opinion, does amount to an attempt to interfere with the right of the Crown to dismiss an established civil servant at any time for any reason, stated or unstated. The letter of February 22, 1943, dismissing the plaintiff, whether or not it was founded on this preliminary inquiry, had the effect of lawfully terminating the plaintiff's employment, and to hold the contrary would be to support an interference with or a clog on the right of the Crown to dismiss at pleasure. For these reasons the action fails.

Judgment for the defendants.

Solicitors for plaintiff: *Bracewell & Leaver.*
Solicitor for defendants: *Official Solicitor to Tithe Redemption Commission.*

C. G. M.

1944
May 5.

Lord Greene M.R. MacKinnon and Luxmoore L.J.J.

CUNNINGHAM-REID *v.* PUBLIC TRUSTEE AND ANOTHER.

Landlord and tenant—Joint tenancy—Death of one tenant—Right of survivor to contribution for rent.

Premises were let to the plaintiff and S., "hereinafter called "'the lessees' which expression shall where the context so "requires or admits include . . . . the survivor of them his "executors or administrators and their or his assigns." The lessees jointly and severally covenanted for the payment of the rent, and the lease also contained a covenant by them not to use the premises except for the purposes of the offices or committee rooms of a named political union. The plaintiff and S. paid the rent in equal shares until S.'s death, after which his executors refused to contribute thereto:—

Held, that, the lease created a joint tenancy both at law and in equity, and that, as the plaintiff had succeeded to the whole benefit of the lease, there was no reason why equity should compel the executors of S. to contribute.

APPEAL from Bloomsbury county court.

By a lease, dated September 29, 1936, John Stanley Beard demised the first floor of 52 Baker Street, London, W., to the plaintiff, Captain Alec Stratford Cunningham-Reid, M.P., and Sir Ernest Sanger, " hereinafter called ' the lessees ' which " expression shall where the context so requires or admits " include the said Alec Stratford Cunningham-Reid and " Sir Ernest Sanger and the survivor of them his executors or " administrators and their or his assigns " for seven years from March 24, 1938, at a yearly rent of 230*l.* payable quarterly. The lessees jointly and severally covenanted for the payment of the rent, and further " that the lessees will not at any time " during the term hereby granted use the demised premises " or any part thereof or permit the same or any part thereof " to be used otherwise than as offices and committee rooms " of the St. Marylebone Conservative and Constitutional " Union." At the date of the lease Sir Ernest Sanger was chairman of the union, and the plaintiff was Conservative member of Parliament for the borough of St. Marylebone. The plaintiff and Sir Ernest Sanger paid the rent in equal shares until the death of Sir Ernest Sanger. Thereafter the plaintiff paid the rent. Differences arose between the plaintiff and the union, and Sir Ernest Sanger's executors refused to contribute to the rent. The plaintiff claimed 57*l.* 10*s.* 0*d.* from the Public Trustee and Arthur Leonard Underwood, as executors of Sir Ernest Sanger, as contribution to the rent paid by him for six months. The county court judge found for the defendants. The plaintiff appealed.

Scott Cairns for the plaintiff. Sections 34 to 36 of the Law of Property Act, 1925, give no assistance in determining whether, in the present case, the plaintiff and Sir Ernest Sanger were joint tenants or tenants in common. It is submitted that they were tenants in common in equity since they entered into the lease for the purpose of the premises being used by an institution in which they were both interested. Their position was analogous to a partnership which is expressly dealt with in the Partnership Act, 1890. [He

1944

CUNNINGHAM-REID
v.
PUBLIC TRUSTEE.

referred to *Boulter* v. *Peplow* (1).] *White* v. *Tyndall* (2) was a case of a joint covenant only, and the executors were held not liable on that ground. [LUXMOORE L.J. Can one of two covenantors, who has acquired the whole beneficial interest by the death of the other, obtain contribution from his executors ? Or conversely, if the executors had been sued by the lessor, would their right against the plaintiff have been limited to contribution or have extended to indemnity?] The common law right of one joint debtor to contribution if he is called on to pay the whole debt can only be defeated by showing some countervailing equitable right. In view of the restrictive covenant as to user, there is no such equitable right here, for the plaintiff obtains no benefit by the succession.

Safford, for the defendants, was not called on to argue.

LORD GREENE M.R. : As the true ground for supporting the judgment in this case (which is different from that adopted by the county court judge) is, in my opinion, to be found in the point which was suggested by my brother Luxmoore in the course of the argument, it will be convenient if he will deliver the first judgment.

LUXMOORE L.J. : There can be no question that the covenant for payment of rent is anything other than a joint and several one, and, were there nothing else in the lease, if either the plaintiff or Sir Ernest Sanger had been sued on it, he would have been entitled to contribution from the other, because it is plain that under the lease a legal joint tenancy is created, whereby the plaintiff and Sir Ernest Sanger became joint tenants of the property. The county court judge has based his judgment refusing contribution on the fact that under the Law of Property Act, whether or not a tenancy in common was created, the plaintiff would have been a trustee for himself and Sir Ernest Sanger. If that had, in fact, been the case it seems to me that the claim for contribution ought properly to have succeeded.

In the present case there is no evidence of what the bargain between the plaintiff and Sir Ernest Sanger was, and, in the absence of any evidence which would establish a tenancy in common in equity between them, it seems plain that the joint tenancy which is created in law is also a joint tenancy in equity.

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(1) (1850) 9 C. B. 493, 507.

(2) (1888) 13 App. Cas. 263.

Sir Ernest Sanger has died, and the plaintiff has succeeded, not only to the legal interest in this lease, but also to the full beneficial interest. As I have said, had the covenant stood alone and had the legal position only to be considered, and if neither of the parties had any beneficial interest in the lease, there could be no question on a covenant in this form but that whichever of them was called on to fulfil it would be entitled to contribution from the other. The substantial point in this case, however, on which I think the plaintiff is bound to fail, is that he has acquired, by reason of the death of Sir Ernest Sanger, the full beneficial interest in the lease. In those circumstances it could hardly be suggested that he, having the full benefit of the lease, could be equitably entitled to call on the executors of his co-covenantor, whose estate has no beneficial interest in it, to pay half the rent. It seems to me that in equity the claim to contribution in these circumstances must, of necessity, fail.

It was suggested that some evidence of some sort of agreement which would constitute some interest other than a joint tenancy was to be found in the fact that in the lease there is a covenant that the lessees will not at any time during the term use the demised premises or permit the same to be used otherwise than as offices and committee rooms of the St. Marylebone Conservative and Constitutional Union. Then follow a number of other restrictions. It was not suggested what exactly was the agreement which was to be inferred from the presence of this covenant which was obviously inserted for the benefit and at the dictation of the lessor, who could undoubtedly release it. If he did so, the plaintiff would, in the events that have happened, have the unrestricted beneficial interest in the property and could deal with it as he pleased. In the circumstances it is impossible to spell out of such a covenant some agreement between the parties which would affect the question whether the plaintiff is entitled in equity to any contribution in respect of the payments of the rent that he has made. This is a different ground from that on which the county court judge based his judgment, but it is a sufficient and conclusive ground against the plaintiff's claim, and I have no doubt, therefore, that the county court judge came to the right conclusion in dismissing the claim, although for the different reasons which I have stated. This appeal must be dismissed, with the usual consequences.

LORD GREENE M.R.: I agree.

MACKINNON L.J.: I agree.

Appeal dismissed.

Solicitors for plaintiff: *Cooper, Bake, Fettes, Roche & Wade.*
Solicitors for defendants: *Underwood & Co.*

J. W. H.

1944
May 11.

Viscount Caldecote C.J., Croom-Johnson and Cassels JJ.

THE KING *v.* HUNTBACH, *Ex parte* LOCKLEY.

Coroner—Inquest—Verdict—No evidence to support verdict—Inquisition quashed—Order for fresh inquest to be held—Coroners Act, 1887 (50 & 51 *Vict., c.* 71), *s.* 6, *sub-s.* 1 (*b*).

A coroner recorded a verdict that the death of a man was due to suicide while his mind was temporarily unbalanced although there was no evidence to support such a verdict:—

Held, that suicide is never to be presumed, and the inquisition of the coroner must be quashed and an order made for a fresh inquest to be held.

Southall v. *Cheshire County News Co. Ld.* (1912) 5 B. W. C. C. 251 applied.

APPLICATION for an order of certiorari to remove into the High Court, pursuant to s. 6 of the Coroners Act, 1887, and s. 19 of the Coroners (Amendment) Act, 1926, the inquisition on the inquest held by the coroner for the city of Stoke-on-Trent, on August 26, 1943, on the body of John Thomas Lockley and for an order that a fresh inquiry might be held. The application was made on behalf of Sarah Anne Lockley, the mother of the deceased man, and with the written authority of the Attorney-General.

Lockley was a miner employed at Berryhill Colliery, Stoke-on-Trent. On August 24, 1943, he reported for work in his normal health and was instructed by a fireman to do some work which, however, he said was too heavy for him. The fireman told him to report to the overman. He did so and was instructed to report back to the fireman. He did not do so, search was made for him, and he was discovered in the mine in No. 3 heading, a roadway out of use which had been fenced off as a dangerous place as it contained gas. Lockley had apparently been there overcome by firedamp. Why or how he came to be in No. 3 heading was unknown. The coroner, by his inquisition, recorded that Lockley's death was due to suicide by exposure to firedamp while his mind was temporarily unbalanced.

1944

THE KING
v.
HUNTBACH.
Ex parte
LOCKLEY.

H. H. Maddocks for the applicant. Under s. 6, sub-s. 1, of the Coroners Act, 1887, the court may quash an inquisition and order a fresh inquest to be held if satisfied " that by " reason of . . . . insufficiency of inquiry, or otherwise, it is " necessary or desirable, in the interests of justice, that another " inquest should be held." There was no evidence on which the coroner could find that Lockley had committed suicide or that he intended to commit suicide, or that his mind was unbalanced. Suicide must never be presumed: *Southall* v. *Cheshire County News Co.* (1). It is, therefore, necessary or desirable in the interests of justice that another inquest should be held. Section 19 of the Coroners (Amendment) Act, 1926, provides that the powers of the High Court under s. 6 of the Coroners Act, 1887, " may be exercised in any case where the " court is satisfied that by reason of the discovery of new " facts or evidence it is necessary or desirable in the interests " of justice that an inquisition or an inquest previously held " concerning a death should be quashed, and that another " inquest should be held." In the present case there is fresh evidence which renders it desirable in the interests of justice that another inquest should be held. There is no case in which it has been held that a coroner's inquisition should be quashed on the ground that there is no evidence to support the verdict, but Talbot J. said in *Rex* v. *Divine, Ex parte Watson* (2) that " the public and those more particularly interested have a right " to expect that the verdict will be given upon the sworn " evidence heard at the inquest and upon nothing else," and s. 4, sub-s. 3, of the Act of 1887 provides that " the jury shall give " their verdict and certify it by an inquisition in writing, setting " forth, so far, as such particulars have been proved to them, " who the deceased was, and how, when, and where the deceased " came by his death." In *Rex* v. *Divine*, Talbot J. said that " ' proved ' must mean proved by sworn evidence as provided " by s. 4, sub-s. 1." " If the inquest has been so conducted, or " the circumstances attending it are such that there is real risk " that justice has not been done, a real impairment of the " security which right procedure provides that justice is done " and is seen to be done, the court ought not to allow the " inquisition to stand " : per Talbot J. in same case.

Vernon Gattie for the coroner. It is admitted that the verdict of the coroner was based to some extent on surmise. The coroner desires to place himself in the hands of the court.

(1) (1912) 5 B. W. C. C. 251. (2) [1930] 2 K. B. 29, 37.

1944

THE KING
v.
HUNTBACH.
Ex parte
LOCKLEY.

VISCOUNT CALDECOTE C.J. Objection is taken to the finding of the coroner on the ground that there was no evidence to support it, and that is the only point in this case. There is no aspersion on or criticism of the coroner's action, except the criticism to which everyone who sits in a court of justice is exposed, namely, that a mistake has been made. It is clear that the coroner sought to discharge his duties with diligence and care, and in accordance with the law.

It having been contended that he gave his verdict on evidence which was not sufficient to show that Lockley's death was due to suicide, it is necessary to consider the evidence in detail. [His Lordship reviewed the evidence.] I am driven to the conclusion that there was nothing in that evidence on which it could properly be said that there was any evidence of suicide. I am satisfied that, if the coroner had been sitting with a jury and had given a proper direction to them, he would have told them : " Whatever you may guess at, there is no basis of proved " fact on which you can return any verdict other than an open " verdict." Section 3 of the Coroners Act, 1887, limits the duties of a jury to acting on evidence which establishes facts and not merely gives rise to surmises. Sub-section 3 of s. 4 is in these terms : " After viewing the body and hearing the " evidence the jury shall give their verdict and certify it by an " inquisition in writing, setting forth, so far as such particulars " have been proved to them, who the deceased was, and how, " when, and where the deceased came by his death." The words " so far as such particulars have been proved to them " seem to emphasize the duty of the jury or of the coroner to confine themselves or himself to finding such particulars as have been proved by evidence. Here the coroner appears to have been attracted by the theory, which remained only a theory to the end of the inquest, that Lockley had deliberately made up his mind to escape for ever from grievances under which he was suffering. Passages in his affidavit illustrate how much he was basing his verdict on guesswork instead of on particulars which had been proved in evidence. The conclusions stated in those passages are nothing more than the expression of a theory which is attractive in its probability. It is not probability, however, which determines verdicts, but proved facts, and, if facts which justify a specific verdict are not proved at an inquest, there is no alternative but to return an open verdict.

We have been referred to *Southall* v. *Cheshire County News Co. Ld.* (1), a workmen's compensation case. An arbitration had been held by the county court judge as the result of the death of a workman who was said to have committed suicide after an injury which it was admitted that he had received. The county court judge found that the death resulted from the accident which caused the suicidal tendency and awarded the dependents a sum of money. The Court of Appeal held that there was no evidence to justify the finding of the judge. Cozens-Hardy M.R., said (1): "Suicide is never to be presumed. "In the next place there is no evidence of suicidal tendency. "The man's son says he never threatened suicide. There is "no one who says he anticipated suicide. Strange to say there "is the report of the doctor made on the very day before the "accident. He did not think there was any suicidal tendency. "The judge seems to have thought it was more likely that the "man committed suicide than anything else. The judge is "not entitled to act upon a surmise of that nature." Then the Master of the Rolls cites *Richard Evans & Co., Ltd.* v. *Astley* (2), where Lord Atkinson said: "One not infrequently "finds, in cases under this Act, surmises more or less shrewd "of this arbitrator or judge, or conjectures more or less "plausible, described as inferences of fact, although there are "no data whatever from which the so-called inferences can "reasonably be drawn." The Master of the Rolls goes on to say: "In the present case there is no evidence to support the "finding of suicide." That was not a case of an inquest by a coroner, but the law as stated by the Master of the Rolls and the other members of the Court of Appeal would seem to apply to the circumstances of the present case. As a coroner is bound by evidence and can find only facts which are proved in evidence and are not the result of mere guesswork, I think that here the coroner was betrayed into a mistake in the verdict at which he arrived.

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(1) 5 B. W. C. C. 251.

The question then arises what ought to be the result. That is to be determined in the light of s. 6, sub-s. 1, of the Coroners Act, 1887, and if we find that, by reason of insufficiency of inquiry or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held we may make an order to that effect. In the exercise of our powers under s. 6, sub-s. 1, I think the inquisition on the inquest which has been held should be quashed, and, inasmuch as it is desirable, in the interests of justice, that there should be a proper

(1) 5 B. W. C. C. 252.

(2) [1911] A. C. 674, 679.

inquisition, that another inquest should take place. The coroner will confine himself to establishing facts so far as he can by evidence and then give a verdict which is supported by the facts which have been proved. The power to order another inquest can be exercised by ordering that it should be held by another coroner of the county, and I think this is a proper case in which to make such an order. In my view, it would be more satisfactory, and possibly more desirable from the coroner's point of view, that the inquest should be held by another coroner. My judgment is confined to the single point that I think that no evidence was given at this inquest on which a verdict of suicide could properly be found.

CROOM-JOHNSON J. I agree. The coroner appears to have confused two things, namely, the filling up of gaps in evidence, which is one thing, and the drawing of necessary and proper inferences from facts when ascertained, which is another. I do not think that there is any evidence on which a coroner's jury properly directed could have returned a verdict of suicide. As was pointed out by the Master of the Rolls and Fletcher Moulton L.J. in *Southall's* case (1), suicide is never to be presumed ; there should be a presumption against suicide, and it is apparent that there was no evidence of facts tendered to the coroner which even began to dispose of that presumption. I think that the coroner—no doubt, in what was possibly not an easy case—drew inferences which he thought he was entitled to draw from the evidence, but I think that in doing so he went beyond his power to draw inferences and filled in gaps in the evidence which was before him, and which was wholly insufficient to enable him to arrive at the conclusion that this was a case of suicide while the balance of the deceased man's mind was disturbed. I agree, for the reasons given by my Lord, with the course which it is proposed to adopt.

CASSELS J. I agree with what my Lord has said about the coroner being actuated by a desire only to discharge his duty according to law, but, in my view, there was no evidence on the depositions to support the verdict which he returned. Suicide is not a verdict at which one can arrive by a process of exhaustion or ruling out the likelihood of other explanations. Suicide is a crime, and the presumption is against it : see

(1) 5 B. W. C. C. 251.

1944

THE KING
v.
HUNTBACH.
Ex parte
LOCKLEY.

Cassels J.

per Farwell L.J. in *Bender* v. *Owners of SS. Zent* (1). I agree that this inquisition should be quashed and that a fresh inquest should be ordered to be held before another coroner.

Inquisition quashed.
Order for fresh inquest.

Solicitors for applicant: *Preston, Lane-Claypon & O'Kelly, for Hollinshead & Moody, Tunstall.*

Solicitors for coroner: *Lake & Son.*

(1) [1909] 2 K. B. 41, 45.

R. F. S.

REX *v.* RECORDER OF DERBY.

Ex parte SPALTON.

1944

May 8.

Viscount Caldecote C.J., Humphreys and Croom-Johnson JJ.

Food and Drugs—Person brought before court as offender by original defendant—Conviction of that person—Appeal to quarter sessions—Need to serve notice on original prosecutor—Summary Jurisdiction Act, 1879 (42 *&* 43 *Vict., c.* 49), *s.* 31, *sub-s.* 1 (ii.) (*as replaced by s.* 1 *of the Summary Jurisdiction* (*Appeals*) *Act,* 1933)*—Food and Drugs Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 83, *sub-s.* 1, 2 (*a*), (*b*).

On a prosecution by information before a court of summary jurisdiction for contravention of a provision of the Food and Drugs Act, 1938, the defendant, acting under s. 83, sub-s. 1, of the Act, by information charged against another person and proved that the contravention was due to the act or default of that person and that he (the original defendant) had used all due diligence to secure that the provision of the Act was complied with. The original defendant was acquitted and the person so brought before the court in the proceedings was convicted, but desired to appeal to quarter sessions. By s. 31, sub-s. 1 (ii.), of the Summary Jurisdiction Act, 1879 (as replaced by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933), notice of appeal in writing must be given to the clerk of the court of summary jurisdiction and to the " other party ":—

Held, that the two informations constituted one set of proceedings and that notice of appeal must be given to the original prosecutor

APPLICATION for mandamus.

On April 29, 1943, Dr. Lilico, medical officer of health for the borough of Derby, laid an information against Wilfrid Greaves Spalton, for that he on April 13, 1943, sold to the prejudice of the purchaser milk which was not of the nature, substance and quality demanded by the purchaser, contrary to s. 3 of the Food and Drugs Act, 1938. Wilfrid Greaves Spalton subsequently laid an information against the applicant Doris Ruth Spalton, trading as the Derbyshire Farmers' Dairy, under s. 83, sub-s. 1, of the Act (1) alleging that the contravention of the Act was due to her act or default, and the applicant laid an information against the Minister of Food, alleging that the contravention was due to his act or default. The three informations were heard together by a court of summary jurisdiction at Derby on July 23, 1943, when the justices found that the offence had been committed. They dismissed the informations against Wilfrid Greaves Spalton and the Minister of Food, but convicted the applicant. She desired to appeal and her notice of appeal was served on the clerk of the court of summary jurisdiction and Wilfrid Greaves Spalton. She swore in her affidavit that she sent a copy of the notice of appeal to Dr. Lilico, " as a matter of courtesy," and it was stated by counsel that this copy was left with the assistant to the clerk of the justices. At the hearing of the appeal at Derby quarter sessions Wilfrid Greaves Spalton did not appear as respondent, and the applicant asked that the appeal should be allowed. The recorder held that, no notice of appeal having been served on Dr. Lilico in accordance with s. 31, sub-s. 1 (ii.), of the Summary Jurisdiction Act, 1879 (as replaced by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933) (1), he had no jurisdiction to hear the appeal. The applicant then obtained leave to apply for a mandamus directed to the recorder to hear and determine the appeal.

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(1) Food and Drugs Act, 1938, s. 83, sub-s. 1 : " A person against " whom proceedings are brought " under this Act shall, upon in- " formation duly laid by him and on " giving to the prosecution not less " than three clear days' notice of " his intention, be entitled to have " any person to whose act or default " he alleges that the contravention " of the provisions in question was " due brought before the court in " the proceedings, and, if, after " the contravention has been " proved, the original defendant " proves that the contravention " was due to the act or default of " that other person, that other " person may be convicted of the " offence, and, if the original " defendant further proves that he " has used all due diligence to " secure that the provisions in " question were complied with, he " shall be acquitted of the " offence." By sub-s. 2 : " Where " a defendant seeks to avail him- " self of the provisions of the pre- " ceding subsection — (*a*) the " prosecution, as well as the per- " son whom the defendant charges " with the offence, shall have the " right to cross-examine him, if he " gives evidence and any witness " called by him in support of his " pleas, and to call rebutting " evidence ; (*b*) the court may " make such order as it thinks fit

R. T. Paget for the applicant. By s. 31, sub-s. 1 (ii.), of the Summary Jurisdiction Act, 1879 (as replaced by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933), the applicant must give notice in writing of her appeal to the clerk to the court of summary jurisdiction and to "the other party." Here there were three informations and so three sets of proceedings, the first brought by Dr. Lilico against Wilfrid Greaves Spalton, the second by Wilfrid Greaves Spalton against the applicant, and the third by the applicant against the Minister of Food. Each step constituted a separate proceeding, and the provisions of s. 83, sub-s. 1, may be compared with those of third party procedure in a common law action. A conviction took place only on the second information brought by Wilfrid Greaves Spalton and on the appeal by the applicant she was the "other party" within the meaning of s. 31, sub-s. 1 (ii.). The practice in such cases is to serve the notice of appeal only on the other party to the information on which the appellant was convicted: see *British Fermentation Products, Ld.* v. *British Italian Trading Co., Ld.* (1); *Hart* v. *Hudson Bros., Ld.* (2). If there were but one set of proceedings, notice of appeal would have to be given not only to the original prosecutor but to all, possibly a large number of, defendants. The applicant asks for no relief as against Dr. Lilico who did not prosecute her. In any case, Dr. Lilico was served with notice of the appeal in writing.

Vernon Gattie for the Recorder. The three informations constituted one set of proceedings with one prosecutor

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"for the payment of costs by any "party to the proceedings to any "other party thereto."

Summary Jurisdiction (Appeals) Act, 1933, s. 1: "The summary "Jurisdiction Act, 1879, shall have "effect as if for s. 31 of that "Act . . . . there were substi-"tuted the following section :— "31.—(1) Subject to the pro-"visions of this section, where a "person is authorised . . . . to "appeal to a court of general or "quarter sessions against a con-"viction . . . . of a court of "summary jurisdiction, the "following provisions shall "apply :— . . . .(ii.) the appel-"lant shall, within fourteen days "after the day on which the "decision of the court of sum-"mary jurisdiction was given, "give to the clerk to that court "and to the other party notice in "writing of his appeal, stating the "general grounds of his appeal, "and signed by him or by his "agent on his behalf."

(1) [1942] 2 K. B. 145.

(2) [1928] 2 K. B. 629.

and three defendants. It is as a matter of mere procedure that the original defendant may bring before the court an alternative defendant by virtue of s. 83, sub-s. 1, and it may be that the only person who is any way culpable is the last of a long line of defendants so brought before the court. That the several informations constitute one proceeding is clear from the use of the words "the original defendant" in s. 83, sub-s. 1, and from the provisions of sub-s. 2 (*a*) and (*b*), for the prosecution is granted the right to cross-examine the original defendant and his witnesses and to call rebutting evidence. The prosecution, however, does not require statutory authority to cross-examine a defendant so that this provision shows that the person brought before the court has become a substituted defendant and power is given to cross-examine the anomalous prosecutor-defendant. Further, the court may make an order for the payment of costs "by any "party to the proceedings to any other party thereto." As Cassels J., said in *British Fermentation Products, Ld.* v. *British Italian Trading Co., Ld.* (1), the object of s. 83 was to avoid multiplicity of proceedings and ample provision was made for having all the parties before the court in the same proceedings and at the same hearing. An original defendant who has been acquitted has no further interest in an appeal by the defendant who has been convicted. The only person really interested to withstand the appeal is the original prosecutor, whose prosecution has resulted in the conviction, and he is the "other party" on whom should be served notice in writing of the appeal. The two cases cited by the applicant did not deal with appeals to quarter sessions. It is clear that Dr. Lilico was not served with notice of the appeal in writing.

Paget replied.

VISCOUNT CALDECOTE C.J. The sole question that arises is whether the provisions of s. 31, sub-s. 1 (ii.), of the Summary Jurisdiction Act. 1879 (as replaced by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933), which require that an appellant to quarter sessions shall give to the "other party" notice in writing of the appeal have been satisfied in that Dr. Lilico, the prosecutor, was not served with the notice of applicant's appeal. There is a subsidiary contention by the applicant that Dr. Lilico was served with notice of the appeal.

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(1) [1942] 2 K. B. 149.

The procedure contemplated by s. 83, sub-s. 1, of the Food and Drugs Act, 1938, which provides a defence for a defendant where some other person is responsible for the commission of the offence charged, is that the court shall first decide whether there has been contravention of the statute, for, by sub-s. 1, "if after the contravention has been proved, the "original defendant proves that the contravention was due "to the act or default of that other person" whom he summoned as responsible, "that other person may be con-"victed of the offence, and, if the original defendant further "proves that he has used all due diligence to secure that the "provisions in question were complied with, he shall be "acquitted of the offence." Once the contravention has been proved, provision is made, as I said in *British Fermentation Products, Ld.* v. *British Italian Trading Co., Ld.* (1), for placing the consequences of committing the offence on the right shoulders. If the person summoned by the original defendant is convicted and wishes to appeal, it is possible that the original defendant may show no further interest in the matter and may, as in the present case, not appear on the appeal to put before quarter sessions evidence of the liability of the person convicted by the court of summary jurisdiction. It is important, therefore, that the original prosecutor should have notice of the appeal so that he may prosecute the appeal as it is a rehearing. On an appeal to quarter sessions, therefore, by a convicted person whom the original defendant charged with the offence, the prosecutor, who launched the proceedings, seems to me to be a party to the proceedings who must receive notice of appeal. It has been contended that Dr. Lilico is not such a party to the proceedings with which the applicant is concerned because the only proceedings to which he was a party were those against Wilfrid Greaves Spalton which resulted in a dismissal of the information. That contention, however, overlooks the fact that by the terms of s. 83, sub-s. 1, there are two questions which the court of summary jurisdiction must determine, first, whether there has been a contravention of the provisions of the statute, and, secondly, on whose shoulders must the responsibility be laid. In this case the court found that there had been a contravention on the prosecution of Dr. Lilico, and, therefore, it is not accurate to say that Dr. Lilico is no longer interested in the proceedings on an appeal to quarter sessions. He is interested because it is his interest to see that the penalty for committing the offence attaches to the person responsible. Dr. Lilico, therefore, should have been served with notice of appeal by the appellant. This conclusion is fortified by the observations of Cassels J., in *British Fermentation Products, Ld.* v. *British Italian Trading Co., Ld.* (1), when he pointed out that the terms of s. 83 make it plain that Parliament contemplated that more than two parties might be before the court and that s. 83, sub-s. 2 (*b*), provided that " the court may make such order as it thinks fit " for the payment of costs by any party to the proceedings " to any other party thereto." Cassels J., added : " So ample " provision is made for having all the parties before the court " in the same proceedings and at the same hearing."

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(1) [1942] 2 K. B. 145.

I have had some hesitation in arriving at a conclusion on the subsidiary point, but I am now of opinion that Dr. Lilico was not so served with a notice of appeal as to satisfy the requirement of s. 31, sub-s. 1 (ii.), of the Summary Jurisdiction Act, 1879 (as replaced by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933). The document relied on was at most an informal intimation, and it was given to the assistant to the clerk to the justices. The sub-section requires that the notice of appeal shall be served in such a form as to leave no doubt that the person served is in the position of a party to the appeal who will have a right to appear and be heard at quarter sessions. This application, therefore, fails on both grounds.

HUMPHREYS J. I have no doubt that the applicant deliberately came to the conclusion that the only persons to be served were the clerk to the court of summary jurisdiction and Wilfrid Greaves Spalton. Accordingly, the notice of appeal was addressed specifically to those two persons and no notice was addressed to the original prosecutor. The applicant states in her affidavit that she sent a copy of the notice of appeal (which is a different act from serving a notice) " to Dr. Lilico " stating that the copy of the notice was sent as a matter of " courtesy." It now appears that she or her advisers left this copy of the notice with the clerk to the justices or his assistant to do with it as he liked. In my opinion, those actions on the part of the applicant cannot be reasonably interpreted as the service of a notice of appeal on Dr. Lilico. For these

(1) [1942] 2 K. B. 149.

reasons, I think that it is plain that no notice of appeal was served on Dr. Lilico.

We have, therefore, a clean cut issue before the court whether it was necessary in law that he should have been so served and on that issue I agree with the judgment of the Lord Chief Justice. I ask myself: Originally, who were the parties in the case when there was a conviction? The only possible answer is that there were three parties and they were the original prosecutor, the original defendant, and the applicant who was summoned by the original defendant as the person by whose act or default the provision of the statute had been contravened. The original defendant was a double party to the proceedings, a defendant in one aspect of the matter and a prosecutor in another, and both parts of the proceeding were heard together. By s. 83, sub-s. 1, the original defendant was "entitled to have any person, to whose act "or default he alleges that the contravention of the provisions "in question was due, brought before the court." How and in what way? "In the proceedings." So far as this case is concerned, there was only one set of proceedings when the two informations against the two defendants were heard by the same court. The language used in s. 83, sub-s. 2 (*b*), enabling the court to make an order "for the payment of "costs by any party to the proceedings to any other party "thereto" is also material. If the contention of the applicant were correct, one would have expected the words "by either "party to the proceedings to the other." These words make it tolerably clear that what was contemplated was one set of proceedings in which, besides the prosecutor, there might be taking part one, two, or half a dozen different persons being both defendant and prosecutor and also an ultimate defendant. In such a case, in my opinion, all these persons would be parties to the proceedings.

The applicant desiring to appeal, the question arose: Who are the persons to whom notice of appeal ought to be given? I do not agree with the contention of counsel for the applicant that, if we hold that Dr. Lilico was entitled to notice of appeal, we must necessarily hold that notice of appeal must also be given to all intermediate defendants. All that is required by s. 31, sub-s. 1 (ii.), of the Summary Jurisdiction Act, 1879 (as replaced by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933), is that there shall be notice of appeal served on all persons who were parties to that part of the proceedings

1944

REX
v.
RECORDER
OF DERBY.
Ex parte
SPALTON.

Humphreys J.

in which there was a conviction. I have never yet heard it suggested that, if A. and B. are prosecuted jointly and B. is convicted, A. is acquitted, and B. appeals, it is necessary for B. to give notice of appeal to A. The appeal is against the conviction. All that I am holding is that Dr. Lilico, who was the original prosecutor and a party to the proceedings, was the "other party" on whom notice of appeal should have been served. I do not think that the original defendant against whom the information had been dismissed as a result of the findings of the court had any right to be served with notice of appeal. When the applicant had been convicted and Wilfrid Greaves Spalton had been acquitted the latter had no further interest in the case. What happened is what would naturally happen without there being any suggestion of collusion, Mr. Spalton, although served with notice of appeal, did not appear at quarter sessions to support the conviction. An appeal to quarter sessions being a rehearing, the prosecutor has again to establish his case and if no one appears on the appeal for the prosecution the conviction must be quashed. One can imagine many cases where a person has been convicted of crime and sent to prison and it would be convenient to him to take such steps by way of notice of appeal that no-one would appear to support the conviction. I agree that this application for mandamus must fail.

CROOM-JOHNSON J. The last words of s. 83, sub-s. 1, of the Food and Drugs Act, 1938, provide that, if the original defendant further proves that he has used all due diligence to secure that the provisions of the statute were complied with, he shall be acquitted of the offence. Mr. Paget has argued, attractively enough, from these words that the two informations in the present case resulted, not in one set of proceedings, but in two, and, if there were further informations under s. 83, sub-s. 1, there would be a series of separate proceedings limited only by the number of persons brought in one after another each as the person by whose act or default the offence charged was contravened. In my opinion, that is a misunderstanding of the language of the sub-section. As Humphreys J. has pointed out, the person against whom proceedings are brought is entitled to have any person to whose act or default he alleges the contravention was due, "brought before the court in the proceedings," but the subsection is careful to distinguish between this person and

" the original defendant." If the person brought before the court by the original defendant was in the position of a third party in third party proceedings in a common law action under rules of court it is difficult to understand why the legislature should have used the words " the *original* defendant." These words suggest that the person so brought before the court is another defendant and that both defendants are before the court in the same proceedings. The provisions in sub-s. 2 (*a*) of s. 83 of the right of the prosecution to cross-examine the original defendant and his witnesses and to call rebutting evidence have already been referred to, and by sub-s. 2 (*b*): " the court may make such order, as it thinks fit, for the " payment of costs," not by the parties to the various separate proceedings, but " by any party to the proceedings to any other party thereto." The proceedings, therefore, are one set of proceedings, and it follows that the prosecutor remains the prosecutor throughout the proceedings. I was at one time attracted a little by the contention that the case was similar to one of third party procedure in the King's Bench Division but such third party proceedings are themselves the subject of a precise code under rules of court while the proceedings here in question must be governed by the language of s. 83 and nothing else.

Appeal to quarter sessions is the creation of statute. Although such an appeal is by way of a rehearing the party desiring to appeal has to give proof of certain facts, and the first question which arises is whether the notices of appeal are in order. By s. 31, sub-s. 1 (ii.), of the Summary Jurisdiction Act, 1879 (as replaced by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933), a notice of appeal must be served on the " other party," and as a rule the " other party " in proceedings of this sort is the prosecutor : I cannot think who else he could be. When an applicant comes to this court for a mandamus calling on a recorder to hear an appeal he must show that he has set the appeal proceedings so far in motion that it was the duty of the recorder to hear the appeal. Very little investigation shows that the form of notice of appeal provided for in such a case has not been served on Dr. Lilico. The applicant has sought to show that she did what was as good and that she brought to the attention of Dr. Lilico the fact that she was appealing so that he could attend the hearing. I am unable to come to the conclusion that any notice of appeal, or anything which this court either

1944

REX
v.
RECORDER
OF DERBY.
Ex parte
SPALTON.

Croom-Johnson J.

is obliged, or ought, to treat as a valid notice of appeal, was served on the prosecutor. In my opinion, the view taken by the recorder was right, and this application must be refused.

Application dismissed.

Solicitors for applicant: *Gibson & Weldon, for Flint, Bishop & Barnett, Derby.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for C. Ashton, Derby.*

C. G. M.

1944

Mar. 14, 15, 22.

Cassels J.

DRAKE *v.* BEDFORDSHIRE COUNTY COUNCIL.

Highway—Nuisance—Fence adjoining highway—Failure to repair—Misfeasance—Continuing danger on highway—Accident caused thereby—Liability of persons causing continuing danger.

The approach road to the D. railway station rose from the main road which went under the railway. There was a footpath by the side of the approach road which was separated from the main road by a grass embankment surmounted by iron railings. A low concrete wall protected the embankment. The approach road and footpath were constructed in 1845 by the railway company. In 1934 the railway company dedicated the footpath for the use of the public as part of the adjoining highway and the B. county council agreed to bear the cost of maintaining it. Between 1929 and 1935 the B. county council carried out an improvement scheme and lowered the main road under the railway bridge. In carrying out this work they pulled down the old concrete retaining wall and erected a new brick wall on concrete foundations, the iron railings, separated by brick piers, being placed on the top of the wall. Under the Trunk Roads Act, 1936, the Minister of Transport became the road authority for certain trunk roads, including the main road, and the B. county council ceased to be the highway authority in respect of that road as from April 1, 1937, from which date they acted as the agents for the minister in carrying out works in connexion with the road. On some date between July and October, 1937, a motor vehicle knocked down a brick pier and left a gap of 16 feet with no railings and 8 feet with only the bottom railing remaining so that there was an unguarded and unfenced drop from the footpath to the main road of about 3 feet. The debris caused by that accident were removed by the employees of the D. corporation acting for the B. county council, but they did not replace the railings or fence the gap. At 10.30 p.m. on October 3, 1943, when it was dark and "black-"out" conditions prevailed, a man fell through the unguarded gap in the railings on to the main road and sustained fatal injuries.

1944

DRAKE
v.
BEDFORDSHIRE
COUNTY
COUNCIL.

His widow sued the B. county council, as being the highway authority, in negligence and nuisance to recover damages in respect of her husband's death under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, 1846. The defendants denied that they were the highway authority after April 1, 1937, and said that they, as the highway authority, were only liable for misfeasance, and not for non-feasance, and that they were not liable to fence the highway, or under any duty to replace the broken railings, and they claimed the protection of the Public Authorities Protection Act, 1893:—

Held, that the defendants were not the highway authority in respect of the main road after April 1, 1937, but were acting merely as contractors of the Minister of Transport and therefore could not claim the protection of the Public Authorities Protection Act, 1893, and that they were liable in damages to the plaintiff as being persons who, by not replacing the railings after the accident in 1937, had caused a continuing danger on the highway by reason whereof the deceased man had lost his life.

Semble, if the defendants had been the highway authority, they would have been guilty of misfeasance and not merely of non-feasance.

ACTION tried by Cassels J.

The plaintiff, Janet Drake, widow and testatrix of the estate of her deceased husband, Ernest Drake, brought the action to recover damages from the Bedfordshire County Council under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of the estate, and under the Fatal Accidents Acts for the benefit of herself and her two children aged at the time of the issue of the writ twelve years and nine years.

Ernest Drake was a bookmaker by occupation in civilian life. At the time of his death on October 4, 1942, at the age of thirty-one, he was a trooper in the Royal Tank Corps. While on leave on October 3, 1942, he had been with friends to Luton greyhound races and had spent part of the evening with his friends at their home and in the Spread Eagle Hotel, Dunstable. After 10 o'clock he was waiting on the approach road to the Dunstable railway station for the Luton omnibus which was to start from that place at 10.40 p.m. About 10.30 he expressed a desire to visit a fried fish shop which was a short distance away and started across the station approach towards the main road. It was a dark night and "black-out" conditions prevailed. Drake had gone only a few yards when he fell a distance of two or three or possibly four feet through a gap in some railings over a dwarf retaining wall between the footpath at the side of the approach to the station and the main road on to the main road itself. He suffered injuries from which he died on the following day. It was admitted by the defendants that his death was due to the accident.

The approach road rose from the main road and gradually bent away from it, but about half way along the slope the footpath divided into two, one branch leading to the station and the other going straight along under the bridge almost parallel to, and at a higher level than, the main road. Between the edge of the footpath at the side of the approach road and of the main road was an embankment, mostly grass and sloping, which varied in height from 14 to 16 feet near the bridge to nothing at the end where it joined the main road. The station approach was constructed with the railway about 1845. In 1920 the Dunstable Town Council, with the sanction of the defendants, built a concrete retaining wall to protect the embankment. Between 1929 and 1935 the defendants carried out an extensive construction scheme which included the lowering of the main road under the bridge. This work exposed the foundations of the concrete retaining wall, and that involved pulling down that wall and erecting a new brick wall on concrete foundations. That work was completed in November, 1934, and the railings, some of which the defendants removed for the operations, were replaced ending at the main road end in a brick pilaster or pier. This railing consisted of two horizontal rails supported by upright iron posts about 8 feet apart. In February and March, 1934, the railway company, which until then had maintained the station approach, including the footpath, dedicated the portion of the footpath running under the bridge parallel to the main road for the use of the public as part of the adjoining highway, and the deeds provided that the Dunstable Corporation should maintain the footpath as part of the adjoining highway. In July, 1934, the defendants agreed to maintain the footpath as part of the main road. By the Trunk Roads Act, 1936, the Minister of Transport became the road authority for the main road, and on January 27, 1937, the minister made an order that for the next two years councils or local authorities should go on acting as his agents. By an agreement, dated April 19, 1937, the minister appointed the defendants as his agents to carry out any work of improvement of or other dealing with a trunk road. Between July and October, 1937, a motor vehicle knocked down the brick pier and bent and misplaced the first and second bays of the fencing on the approach road. There was a "tidying up" of the fragments by the employees of the Dunstable Corporation acting for the defendants, who, in turn, were acting for the minister under the agreement of April 19, 1937. Nothing further was done. This left a gap of some 16 feet wide with no railings plus 8 feet with only the bottom rail between the two posts. There was an unguarded and unfenced drop from the footpath by the side of the station approach to the main road varying in height from a few inches to about 3 feet where there were no railings and more where there was only one rail. At the foot of the dwarf wall was an 8-inch kerb, but no footpath. At the time of the accident the place was not lighted during darkness. On March 16, 1939, the minister made another agreement with the defendants, delegating to them his functions with regard to trunk roads. By cl. 3 it was provided as follows: "The council shall in exercising "the said function take all reasonable precautions for the "protection of public and private interests as if the council "were the highway authority, and subject thereto the "minister shall indemnify the council against all claims for "damages and compensation in relation to the exercise of "the said functions which may be brought against the council "and in respect of such costs as may thereby be incurred." The roads were named in the schedule and included the main road. It was further provided that the defendants should not maintain or repair any part of a trunk road for the maintenance and repair of which the minister was not liable. The function of the minister referred to in that agreement included "provision and maintenance of fences . . . . necessary for "the support or protection of the highway."

The plaintiff's claim, by writ issued on March 15, 1943, was based on negligence and nuisance against the defendants as the highway authority or agents for the highway authority, or as the council for the county of Bedford in which area the place of the accident was situated. It was alleged that the lack of fencing of the embankment and dwarf wall was dangerous to the public, that no warning was given to the deceased of the danger, and that after the accident in 1937, the defendants negligently failed to replace the railings and thus permitted the danger to remain on the highway. The defendants admitted that they were the highway authority from before 1934 until March 31, 1937, after which date this piece of highway became vested in the Minister of Transport of whom the defendants were the agents by agreement, but they denied that they owed any duty to the plaintiff. They admitted that they did not replace the portions of the railings damaged by the accident in 1937, and denied that they were under any duty to do so. They traversed the allegations of negligence and nuisance, and they further pleaded the Public Authorities Protection Act, 1893, s. 1. They denied that they were the highway authority or agents for the highway authority for the approach to the station. In the course of the trial the defendants admitted that the place of the accident became dangerous to pedestrians lawfully using the station approach road, when black-out conditions came into existence in September, 1939.

Beresford K.C. and *Granville Sharp* for the plaintiff.

Cartwright Sharp K.C. and *Gerald Howard* for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

March 22. CASSELS J. read the following judgment in which he stated the facts and continued: The plaintiff must establish that the death of her husband was brought about by negligence or nuisance committed by the defendants, and consideration has to be given to the Public Authorities Protection Act, 1893, to see whether it applies. I find as facts that the deceased met his death by reason of the danger which existed at this spot, that that danger was created by the absence of a fence guarding the drop from the footpath over the dwarf brick wall to the main road, that there was no warning during darkness of the presence of that danger, that the absence of the fence constituted a nuisance which continued and remained from 1937, the time when it was damaged and tidied up, until the accident by which the deceased met his death. The defendants rest their defence on several grounds: (1.) that this fence and the dwarf wall were a part of the highway, that is, the trunk road, and the defendants were not the highway authority for the trunk road at the time of this accident and had not been the highway authority for that road since April 1, 1937, when the Minister of Transport took it over, which was before the accident which knocked the fence down. (2.) The defendants' as a highway authority are not liable for non-feasance and are not liable to fence a highway or to keep a fence in repair. (3.) The Public Authorities Protection Act, 1893, s. 1, protects the defendants as a public authority from any action in respect of anything done or omitted to be done before six months before October 3, 1942.

Before 1934 this footpath was undoubtedly on private property. After 1934 it became vested in the Dunstable Corporation and by arrangement between that corporation and the defendants its maintenance was undertaken by the defendants. If the footpath became a part of the main road, then it was taken over by the Minister of Transport on April 1, 1937, and the defendants ceased to be the highway authority with regard to it. I think it would be reasonable to hold that this footpath did become a part of the main road and I am prepared to find it as a fact. It is a footpath which could be, and, doubtless, is, used by pedestrians going along the main road and not going to the station; it has been so regarded by the defendants. So far as the deceased was concerned, he was lawfully using a highway and without negligence on his part fell off it on to another part of it by reason of the danger which is admitted by the defendants to have been there.

Are the defendants in law and in this action responsible for this danger? The position which the defendants have taken up, with a frankness which is characteristic of their conduct of this case throughout, is that after the accident in 1937 there would be a tidying up of the fragments by the foreman and other employees of the Dunstable Corporation acting for the defendants who in turn would be acting for the Minister. That tidying up, in my view, made the place no better, but, in fact, probably worse from the point of view of the protection of the public against the danger. We do not know where precisely the deceased man fell except that he fell somewhere through the gap which was left and was found injured on the roadway of the main road below. Dangerous as this gap was in its entire length I can imagine nothing more dangerous than the space between the two posts where the lower rail only a few inches from the ground is left. A pedestrian in the dark crossing at that spot might easily trip over the rail and be thrown headlong into the roadway below, possibly in the way of wheeled traffic. A person who leaves a danger on a highway leaves a public nuisance which remains until it is abated. It was the defendants' agents who created the danger by taking away what was left after the accident of 1937 and not replacing the railings. In what capacity did the defendants stand in regard to that? They themselves have said that they were the agents of the minister who was the real and only highway authority. If that is so, then they were merely contractors carrying out a contract and not a public authority, and not entitled to the protection of the Public Authorities Protection Act, 1893: see *Bradford Corporation* v. *Myers* (1); assuming in the circumstances that it applied in view of the continuing nuisance; but, whichever way they turn, my view is that the defendants cannot escape liability. I hold that this was a continuing nuisance, a continuing danger to the public. It is contended on behalf of the defendants that at most they were only guilty of a non-feasance. I decide against the defendants on that point. I am satisfied that this was a misfeasance, but the point only arises if the defendants were the highway authority, and they were not, and have said so. They do not become a highway authority because they act under a contract with a highway authority.

Assuming that they were a highway authority they might still be liable if this was a misfeasance, as I hold it was: see *McClelland* v. *Manchester Corporation* (2). In that case Lush J. said: (3) "If a highway authority, therefore, leaves "a road alone and it gets out of repair, there is, of course, no "doubt that no action can be brought, although damage "ensues. But this doctrine has no application to a case where "the road authority have done something, made up or altered "or diverted a highway, and have omitted some precaution, "which, if taken, would have made the work done safe instead "of dangerous. You cannot sever what was omitted or left "undone from what was committed or actually done, and "say that because the accident was caused by the omission "therefore it was non-feasance. Once establish that the "local authority did something to the road, and the case is "removed from the category of non-feasance. If the work "was imperfect and incomplete it becomes a case of mis"feasance and not non-feasance, although damage was "caused by an omission to do something that ought to have "been done. The omission to take precautions to do something "that ought to have been done to finish the work is precisely "the same thing in its legal consequence as the commission

(1) [1916] 1 A. C. 242.
(2) [1912] 1 K. B. 118.
(3) Ibid. 127.

" of something that ought not to have been done, and there " is no similarity in point of law between such a case and " a case where the local authority have chosen to do nothing " at all." If, however, the defendants were not the highway authority, then the point of the distinction between liability for non-feasance and misfeasance does not arise. Assuming the defendants in what they did and omitted to do through their agents, the Dunstable Corporation, were acting as a public authority in the discharge of a public duty (which I hold they were not) they would have been guilty of a continuing breach of duty right through until the happening of the accident which caused the death of the deceased man. In *Huyton and Roby Gas Co.* v. *Liverpool Corporation* (1), which was a case of damage to gas pipes through neglect to ram the earth sufficiently, where the defendants relied on the Public Authorities Protection Act, 1893, because the action had not been commenced within six months of the negligence, Bankes L.J. said (2): " An act of omission may constitute " a breach of duty just as an act of commission can." Then a little further on he said: " From some points of view and " in some cases it is easier to establish a continuing neglect " or default in the case of an act of omission than in the case " of an act of commission, because once it is established that " the act of omission constitutes a breach of duty the breach " continues under most circumstances until the omission is " remedied. This is, of course, not true where it can be " established that the duty to remedy the omission ceased " before the injury complained of occurred, or on the present " construction of the statute, if it ceased more than six months " before the commencement of an action complaining of the " omission." Scrutton L.J. said (3): " What is the effect " where the cause of action is damage following from an act " or neglect, and the act is before the six months' period " but the damage within it? Where there is one act which " causes damage which gradually develops, as in a claim for " personal injury, we are bound by the decision of the Court " of Appeal in *Carey* v. *Bermondsey Borough Council* (4) to " hold that time runs from the act, and not from the latest " damage. It is not necessary to decide in the present case, " what is the result where no damage occurs till six months " has elapsed from the act, and damage is a necessary part of

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(1) [1926] 1 K. B. 146.
(2) Ibid. 152.
(3) [1926] 1 K. B. 154.
(4) (1903) 67 J. P. 447.

1944

DRAKE
v.
BEDFORDSHIRE
COUNTY
COUNCIL.

Cassels J.

"the cause of action. If time runs from the act this leads "to the startling result that you may lose a cause of an action "before you have got it. Possibly this remarkable result "might be avoided by holding that the words 'neglect "'complained of,' 'default complained of,' involve something "which can be legally complained of, and therefore the time "runs from the accruing of the cause of action, though not "from the latest development of the damage; but it is not "necessary so to decide in the present case. But the case "seems to me quite different where after the original act there "is a legal duty to avert its consequences, neglect of which "is a continuing breach from day to day. Where a man "removes a support, which he ought to render continuously, "and does not replace it, there is a continuing breach of "duty, and on the day of the damage complained of there is "a neglect and damage resulting therefrom, and it seems to "me immaterial that the original removal was some time "before. This helps one to appreciate the meaning of the "concluding words of the section 'or in case of a continuance "'of injury or damage, within six months of the ceasing "'thereof.'" Of course, the time runs from the negligent act and not from the resulting damage: *Freeborn* v. *Leeming* (1), but in the case of "a continuance of injury or damage," to quote the words of the Act, the time runs from the ceasing thereof. In the present case this danger continued from the time of its creation until the death of the deceased, but, if the defendants were not acting in the execution of any public duty or authority within the meaning of the statute, then the only limitation which applies is that of six years, and whether that time runs from 1937, or from October 3, 1942, the plaintiff has started her proceedings within the time.

A further point discussed in the course of the case was whether these railings were part of the highway or not. They were certainly on the highway, and yet, of course, they may not be a part of the highway. For instance, seats, lamp-posts, police and telephone booths, pillar-boxes, direction posts, sand bins and such like things are to be found on a highway, but they may not be a part of it. In *White* v. *Hindley Local Board of Health* (2), a grid of a sewer was held to be a part of the sewer and the local board of health was held liable for leaving it in a dangerous condition. The same result occurred in the traffic stud case, *Skilton* v. *Epsom and Ewell*

(1) [1926] 1 K. B. 160.

(2) (1875) L. R. 10 Q. B. 219.

Urban District Council (1), and in the abandoned tramway case, *Simon* v. *Islington Borough Council* (2). I do not think that the point calls for decision in this case. These railings, in the condition in which the defendants by negligence and nuisance caused them to be, were a danger on the highway whether they were a part of it or not, and they continue to be so. The railway company put them there originally. The defendants pulled some of them down and put them back when they reconstructed the dwarf wall and may be said to have exercised dominion over them.

I hold that the defendants are liable, not as a highway authority but as persons who by their act have caused a continuing danger on the highway, by reason of which danger the deceased man was killed. I award the plaintiff, under the Law Reform (Miscellaneous Provisions) Act, 1934, as testatrix of her deceased husband's estate the sum of 300*l.* as damages and 38*l.* 12*s.* 6*d.* for funeral expenses, and under the Fatal Accidents Act, 1846, the sum of 1,375*l.* of which 375*l.* is for the benefit of the two children of the deceased.

Judgment for plaintiff.

Solicitors for plaintiff: *Harold Kenwright & Cox.*
Solicitors for defendants: *Berrymans.*

An appeal was entered against this decision, but on May 12, 1944, the Court of Appeal dismissed the appeal by consent without the case having been put into the cause list.

(1) (1937) 1 K. B. 112. (2) [1943] K. B. 188.

R. F. S.

NO-NAIL CASES PROPRIETARY, LIMITED *v.* NO-NAIL BOXES, LIMITED.

C. A.

1944
Feb. 7, 8; *Mar.* 27, 28, 29, 30; *April* 21.

Scott, Luxmoore and du Parcq L.JJ.

Patent—Right of Crown to use patented invention—Power to interfere between patentee and licensee—Effect on royalty agreement—Provision for minimum payment—Patents and Designs Acts, 1907 *to* 1939, *s.* 29, *sub-s.* 1.

Licensees were manufacturing a patented invention and paying a royalty to the licensors under a licence which provided that the minimum amount of the aggregate of the royalties payable by the licensees in respect of each machine operated should never be

C. A.

1944

No-Nail Cases Proprietary, Ld.
v.
No-Nail Boxes, Ld.

less than the sum which would be payable in respect of each machine if working at one-half of its full capacity. The licence provided that the maximum capacity of each unit should be declared and guaranteed by the licensor on installation of each unit from which should be calculated the full capacity of each unit, but the licensors, in fact, never gave a declaration and guarantee of maximum capacity. A government department to whom the licensees were supplying the product of the patented invention authorized the licensees in writing to use the patented invention for the services of the Crown and directed them in future (1.) to include no royalty payable under the licence in the prices charged for the product, and (2.) to pay no royalty to the licensors in respect of the product supplied for the services of the Crown, stating that they (the government department) would settle any claim of the licensors, and the licensees complied with the directions. The licensors brought an action against the licensees claiming payment of royalties under the licence. Atkinson J. held that, under s. 29, sub-s. 1, of the Patents and Designs Acts, 1907 to 1939, the terms of the licence were inoperative so far as concerned the use of the invention for the services of the Crown, and, therefore, no royalty in respect of that use was due from the licensees to the licensors, but that the provision in the licence for the minimum payment was not affected by the sub-section and remained operative. Both the licensors and the licensees appealed :—

Held, dismissing the licensors' appeal, that, it was clear from the language of s. 29, sub-s. 1, of the Patents and Designs Acts, 1907 to 1939, that when the government department authorized the licensees to use the invention in question for the services of the Crown on terms to be agreed on between the department and the licensors or otherwise settled in pursuance of the sub-section, it was the intention of the legislature that, so far as concerned the use of the invention for the services of the Crown, the terms of the agreement and licence concluded between the parties had become inoperative :—

Held, further, allowing the licensees' cross appeal, that, since the minimum amount to be paid depended on a calculation which was based solely on the declared and guaranteed maximum capacity and the licensors had failed to give a declaration and guarantee, they had made the calculation impossible and so lost their right to minimum payments.

APPEAL from Atkinson J. (1).

The plaintiffs (hereinafter called " the licensors ") owned letters patent of inventions relating to boxes, cases and containers made without nails. By a deed executed on July 5, 1935, the licensors granted to the defendants (" the licensees ") an exclusive licence to use those inventions and to use and sell the products manufactured, the consideration being the payment of 40,000*l.* in cash and of a royalty of five-eighths of a penny per double yard of channelled metal strip produced by every machine unit operated (after a fixed number of double yards of channelled metal strip had been produced from certain units). By cl. 7: "Unless the aggregate of the "royalties payable by the licensee in respect of each unit "operated by the licensee . . . . under the provisions hereof "during the first six months following the expiration of one "year from the date upon which payment of the first monthly "instalment of royalties in respect of such unit commences "amounts to a sum equivalent to that which would have "been payable if such unit had been operated at one-quarter "of its full capacity the licensee shall pay to the licensor "such an amount as together with the actual amount paid "and/or payable shall equal the sum which would be payable "in respect of such unit if working at one-quarter of full "capacity. Similarly, for the succeeding six months and "thereafter during the continuance of this licence in respect "of each period of six months the minimum amount to be "paid by the licensee in respect of each unit shall never be "less than the sum which would be payable in respect of "each unit if working at one-half of the full capacity of such "unit . . . . The maximum capacity of each unit shall be "declared and guaranteed by the licensor upon installation "of such unit from which shall be calculated the full capacity "of each unit based on the amount of double yardage of "channelled metal strip capable of being produced and "affixed to the relative boxes, cases and containers during "a fifty week year of normal union working hours with a "twenty per cent. allowance for fall-off and a further "reasonable allowance for fall-off due to wear and tear whereby "such unit is unable to maintain full capacity." By cl. 16: "The licensee shall not during the continuance of this licence "use, import, export or sell or deal in the products except under "and in pursuance of this licence." The licensors never gave the licensees a declaration and guarantee of maximum capacity of each unit. In 1939, 1940 and 1941 the licensees supplied containers to certain companies who were acting as agents for the Secretary for Air, and on all these boxes they paid to the licensors royalties due under the deed of July 5, 1935. By a letter of December 10, 1941, the Director of Contracts of the Ministry of Aircraft Production, acting on behalf of the Air Ministry, requested the licensees to include

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(1) [1943] K. B. 633.

C. A.
1944

No-Nail Cases Proprietary, Ld. v. No-Nail Boxes, Ld.

no royalty in the prices charged for containers manufactured for the services of the Crown after December 31, 1941, and to pay no royalty in respect of such containers. The letter continued: "In order that manufacture of containers may "continue according to law, you are hereby authorized to "use any patents so far as such use is necessary in the manufacture of containers for the services of the Crown. This "authority is given under ss. 29 and 58A of the Patents and "Designs Acts, 1907–1939. The department will deal with "and settle any claims arising out of the use of such patents "within the terms of this authority." By a subsequent letter from the ministry, dated February 5, 1942, the licensees were informed that the request contained in the letter of December 10, 1941, applied "to all containers supplied either "directly or indirectly for the services of the Crown whether "the containers are ordered from you by this department or "by other departments or by other contractors." The licensees having complied with the terms of the letter of December 10, 1941, and the licensors having failed to obtain from the Ministry of Aircraft Production recompense for the use of their letters patent, the licensors brought this action against the licensees claiming an account of royalties due after December 31, 1941, under the licence contained in the deed of July 5, 1935, and payment thereof, and damages for breach of contract, being interest on any sum found due to the licensors. Atkinson J. held that under s. 29, sub-s. 1, of the Patents and Designs Acts, 1907 to 1939 (1), the terms of the licence were inoperative so far as concerned the use of the patent for the services of the Crown, and, therefore, no royalty in respect thereof was due from the licensees to the licensors, but that the provision in the licence for the minimum payment was not affected by the sub-section and remained operative. The licensors appealed, and there was a cross-appeal by the licensees.

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(1) By s. 29, sub-s. 1, of the Patents and Designs Acts, 1907 to 1939: "A patent shall have to all "intents the like effect as against "His Majesty the King as it has "against a subject: Provided "that any government department may, by themselves or by "such of their agents, contractors, "or others as may be authorised "in writing by them at any time "after the application, make, use "or exercise the invention for the "services of the Crown on such "terms as may, either before or "after the use thereof, be agreed "on, with the approval of the "Treasury, between the department and the patentee, or, in "default of agreement, as may be "settled in the manner hereinafter provided. And the terms "of any agreement or licence "concluded between the inventor "or patentee and any person "other than a government department, shall be inoperative "so far as concerns the making, "use or exercise of the invention "for the service of the Crown ". . . ."

Granville Sharp and *Diplock* for the licensors. The decision of Atkinson J. with regard to the licensors' claim for royalties under the licence was wrong. Where there is an agreement between a patentee and a licensee with regard to the use of a patent, the Crown is not entitled by one of its departments to say to the licensee that, by virtue of s. 29 of the Patents and Designs Acts, he is to supply goods for the purposes of the Crown, either by selling them direct to the Crown or by selling them to persons who are supplying the Crown, without paying any royalty to the patentee. If the Crown or its agents or contractors or others authorized in writing by them buy these boxes from the licensees, they are not " making, using or exercising " the invention for the services of the Crown. For the Crown to " make use or exercise the invention " by an agent or contractor the relationship of principal and agent or of contractors must exist before there is a " making, using or exercising of the " invention." Section 29 has not the effect contended for by the licensees who were really putting the case for the Crown. When Parliament legislates, it does so to effect a change in the law unless it is passing a consolidating statute. No change in the law was necessary to authorize the licensees to manufacture the patented article for the services of the Crown. They could do so under the terms of their licence. The licensees were not contractors within the meaning of the section, nor were they agents of the Crown. The section was not intended to affect existing agreements. The patent is granted by the Crown to the patentee and it reserves to him all rights in the patent. When a government department requires a person to manufacture an article for the services of the Crown and that person can only manufacture the article by infringing a patent, he requires authority in writing to enable him to do so, and the section comes into operation: *Pyrene Co., Ld.* v. *Webb Lamp Co., Ld.* (1). Atkinson J. was wrong when he rejected the argument that the proviso was to be treated as a proviso and not as the main enacting part of the section. In *Rex* v. *Dibdin* (2) Fletcher Moulton L.J. said that it was a " fundamental rule of

(1) (1920) 37 R. P. C. 57.

(2) [1910] P. 57, 125.

C. A.

1944

No-Nail Cases Proprietary, Ld. v. No-Nail Boxes, Ld.

"construction that a proviso must be considered with relation "to the principal matter to which it stands as a proviso." A proviso must be regarded as striking out something from the principal enactment. Section 29 says: "A patent shall have "to all intents the like effect as against His Majesty the King "as it has against a subject." The proviso modifies that, but it was not intended to enable the Crown to avoid paying the same price that anyone else would have to pay. [*Aktiengesellschaft für Autogene Aluminium Schweissung* v. *London Aluminium Co., Ld.* (*No.* 2) (1), was referred to.] The category of persons who come within the protection of s. 29 is limited. To come within that category they must comply with three conditions (1.) they must be persons who are using the invention for the services of the Crown; (2.) they must be persons by whom the government department is using the invention, and (3.) they must have the written authorization of the government department so to do. At common law there was always a condition that, if the patentee did not supply for the service of the Crown such of the articles of the invention as might be required, the letters patent should come to an end: see *Feather* v. *The Queen* (2), but the Crown could not before the passing of the Patents, Designs and Trade Marks Act, 1883, authorize contractors to use the letters patent: *Dixon* v. *London Small Arms Co.* (3). By s. 27 of that Act a patent was to bind the Crown, but a department of the Crown might "by "themselves, their agents, contractors or others" use the invention for the services of the Crown. The term "others" refers to workpeople who are using the patent. Articles which are intended ultimately to be used for the service of the Crown are not identifiable until they are actually used by the government department. A contract for the sale of goods does not come within the section.

Sir D. B. Somervell A.-G. and *H. L. Parker* for the Crown, at the request of the court, as amici curiæ. The provisions of s. 29, sub-s. 1, of the Patents and Designs Acts, 1907 to 1939, apply to the case of a sale or sub-contract. The sub-section is framed in very wide terms. It has been said that it does not apply to a purchase on a contract of sale, but the proviso was inserted in the Patents, Designs and Trade Marks Act, 1883 (see s. 27, sub-s. 2), in consequence of the decision of the House of Lords in *Dixon* v. *London Small Arms Co.* (3), where it was

(1) (1923) 40 R. P. C. 107.
(2) (1865) 6 B. & S. 257.
(3) (1876) 1 App. Cas. 632.

held that persons using the patent were liable to the patentee for an infringement of the patent as they were not servants or agents of the Crown doing the work of the Crown, but were private contractors with the Crown to supply certain manufactured articles. To remedy that position the Act of 1883 was passed. Section 27 of that Act was to all intents and purposes the same as s. 29 of the Act of 1907. It affected an alteration in the law and gave the patentee compensation for the use of the invention by the government or any department of the government, and at the same time authorized the department to make use of the invention on terms which, in default of agreement, should be settled by the Treasury: *Pyrene Co.* v. *Webb Lamp Co.* (1). In the present case the vendors of the articles were not merely licensees, but were contractors. The word "contractors" in the proviso to s. 29 is not limited by the word "others." It means anyone who has a contract with a government department and is used in contradistinction to "agent." The Crown may be using a patent though it purchases the patented article from a person who sells to them. A person who has a contract with the Crown to sell a patented article may be authorized by the Crown in writing to make use or exercise the invention. Section 29 also applies to a case where the person supplying the article to the Crown is not a contractor, but a sub-contractor. The Crown were in much closer relationship to the licensees than in an ordinary case of a sub-contractor. Where the contract is one to manufacture certain articles and it is necessary to use a patent to do so, the order of the Crown to use the patent will protect the manufacturer in the use of the patent although the interest of the Crown in the patent may be very small. The words of s. 29 entitle the government to authorize anyone to use the patent. The only thing that could be contested is whether the article manufactured by the use of the patent was being made for the services of the Crown, and that point cannot arise on the facts of the present case. The only condition is that the Crown has given an authority in writing. If the article manufactured by the use of the patent is for the use of the Crown and a written authority has been given by the Crown the person manufacturing the article is protected by the section. A user which, but for the authorization, would be an infringment of the patent is covered by the section. The fact that the Crown under the terms of the patent has the right to revoke the patent if the patentee does not supply the articles required is no ground for cutting down the rights of the Crown. The Crown may want, not to revoke the patent, but to work the patent on reasonable terms. There is no need for the manufacturer of a patented article to know at the time of manufacture whether he is manufacturing for the services of the Crown. He knows he is manufacturing either for the services of the Crown or under a licence. The fact that the person sought to be authorized is a licensee does not thereby render the section inoperative. The judgment of Atkinson J. on this point is right. The mischief against which the section was aimed was the failure of the supply of patented articles, not the price.

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(1) 37 R. P. C. 57.

Sir Walter Monckton K.C. and *Valentine Holmes* for the licensees on their cross appeal. The provision in the deed of July 5, 1935, for the payment of a minimum sum as royalty is not operative for three reasons. First, the proviso to s. 29, sub-s. 1, of the Patents and Designs Act rendered inoperative not only cl. 6 but also cl. 7 of the deed. Secondly, the event on which minimum royalties became payable under cl. 7 was a failure to operate the unit, whereas these machines were being worked every day and all day for the manufacture of articles for the services of the Crown. Thirdly, the provision in cl. 7 that "the maximum capacity of each unit shall be "declared and guaranteed by the licensor upon installation" is a condition precedent to liability under the clause and it has not been fulfilled. There was no evidence on which the judge could find a waiver of that condition, and, therefore, his judgment awarding the licensors minimum royalties was wrong and ought to be reversed.

Counsel for the licensors did not argue this point.

Cur. adv. vult.

April 21. du Parcq L.J. read the judgment of the court (Scott, Luxmoore and du Parcq L.JJ.) in the licensors' appeal. It became clear in the course of the argument of the licensors' appeal that the interests of the Crown might be affected by our decision, and that it was desirable that the Crown should be represented at the Bar so that all relevant arguments might be put before us. Counsel for both parties welcomed a suggestion that the Attorney-General should be invited to appear as amicus curiæ, and we are indebted to him

C. A.

1944

No-Nail Cases Proprietary, Ld. v. No-Nail Boxes, Ld.

for acceding to our request and for his valuable contribution to the full and able discussion which we heard at the Bar.

Atkinson J. found himself compelled to decide against the licensors on the first of their two main contentions, which was, that s. 29, sub-s. 1, of the Patents and Designs Acts, 1907–1939, did not render inoperative, or in any way affect, the terms of the agreement and licence contained in the deed of July 5, 1935. We agree with the learned judge's conclusion on this part of the case and can add little to what he said, but, in deference to the elaborate and ingenious argument presented to us by the learned counsel for the licensors, we will state in our own words why we think that their contentions must fail.

In our view, the language of s. 29, sub-s. 1, is clear, and anyone who reads it with a sincere desire to give effect to the expressed intention of the legislature can hardly fail to give to it the meaning for which the Crown and the licensees contend. A government department has authorized the licensees to use the invention in question for the services of the Crown, on terms to be agreed on between the department and the licensors as patentees or otherwise settled in pursuance of the sub-section. It follows that, so far as concerns the use of the invention for the services of the Crown, the terms of the agreement and licence concluded between the parties have become inoperative. But, say the licensors by their counsel, to read the section with this simple adherence to its literal meaning is to do violence to a settled principle of construction. In *Rex* v. *Dibdin* (1), Fletcher Moulton L.J. referred to "the "fundamental rule of construction that a proviso must be "considered with relation to the principal matter to which it "stands as a proviso;" and many cases can be cited in which this rule has been observed. It is, indeed, only a branch of the elementary principle that words in a statute (and, we may be pardoned for adding, words in a judgment) must be read with reference to their context. One expects a proviso to depend on, and to limit or define, the main enactment. In *Rex* v. *Dibdin* (2) (to take that case as an example) the main enactment said that no marriage contracted between a man and his deceased wife's sister should thenceforth be void or voidable as a civil contract by reason of such affinity. The proviso that no clergyman should be liable to any suit, penalty or censure for anything done or omitted to be done by him in the performance of the duties of his office could fairly be read

(1) [1910] P. 125. (2) [1910] P. 57.

as meaning that a clergyman who refused to solemnize such a marriage was not to be exposed to penalties. So read, it fulfilled one of the purposes of a proviso in that it modified the main enactment. To interpret it as meaning that a clergyman could lawfully treat two persons lawfully united in wedlock as "open and notorious evil livers" would have been to regard the legislature as having, one might almost say covertly and surreptitiously, introduced into a proviso an enactment of wide import. The context did not require, and could hardly be said to permit, such a construction. It must not be supposed, however, that, if Parliament had in plain terms stated in the proviso that a clergyman might do just what the clergyman in *Rex* v. *Dibdin* (1) had claimed a right to do, the courts would have been entitled to refuse to give effect to that enactment on the ground that the draftsman of the Act had broken a rule which he should have observed. The object of the rule is to ensure that effect shall be given to the true intention of Parliament and not to prevent the courts from giving effect to that intention. Still less is the rule designed for the purpose of defeating the intention of the legislature. The courts have not, and certainly do not claim, the right to say to Parliament or to its draftsmen: "Observe the rules "which we lay down, or, though your meaning may be "perfectly clear, we will teach you a lesson by interpreting "your language in a sense which you obviously did not "intend." Whether the section is viewed in its historical setting or read without reference to the state of the common law down to 1883 and to the legislation and judicial decisions subsequent to that date, it appears to us that much misplaced ingenuity must be exercised before its natural meaning can be cut down. It was said that, since a licensee already has authority to "make, use or exercise the invention," he could require no further authority, but what the government department may give him is not merely an authority to use the invention, which he certainly does not need, but an authority to use it for the services of the Crown on terms which are to be agreed, or settled in accordance with the statute, and that is a very different thing. It is not a matter for surprise that Parliament should allow this latter authority to be granted to a licensee by a government department, and it must certainly have been in the contemplation of Parliament that the Crown would often wish to make use of the services of the licensees of a patent, who, in practice, must often be

(1) [1910] P. 57.

the most suitable, and, sometimes, the only, persons who can be employed.

Then counsel for the appellants argued that the proviso does no more than enable government departments to use a patent which, without it, they could not have used. Apart from the section, there was, they said, nothing to prevent the government department from making use of this invention at a price, and Parliament did not mean to enable them to avoid paying the price which any of His Majesty's subjects would have to pay. We can only say that it seems to us to be clear that not the least important object of the proviso was to relieve government departments of that obligation. Then there was a suggestion, which we find it difficult to follow, that the licensees could not be brought within the words " their agents, contractors or others." Those words seem to us to be wide enough to include anybody on whom a government department may choose to confer its authority. It is true that the government department must make, use or exercise the invention " by " the authorized " agents contractors or others," but this only means that the authority must empower or permit the " agents contractors or others " to do for the department what (if that course were convenient) it might do for itself. In our opinion, Sargant J. correctly summarized this part of the proviso when he said " Protection " is afforded to the government department, and to any " person or persons, contractors or others, who are acting " as agents for, or by the express or implied authority of " a government department " : see *Aktiengesellschaft für Autogene Aluminium Schweissung* v. *London Aluminium Co., Ld.* (*No.* 2) (1).

It is, of course, essential that the persons acting by the authority of the government department shall make, use or exercise the invention " for the services of the Crown," but, if this condition is fulfilled, the relationship between the Crown or the government department and the persons acting by the department's authority is otherwise immaterial. It was objected that, on this construction, the words " agents, " contractors, or others " mean no more than " any person " or persons whatsoever," and are an unnecessary periphrasis. That they are periphrastic must be admitted, but the periphrasis has a historical explanation. Until the legislature intervened, the Crown was free to use a patented invention by

(1) 40 R. P. C. 107, 117.

its "officers, agents and servants . . . . acting on behalf of "and for the use of the Crown": see per Lord Cairns L.C., in *Dixon* v. *London Small Arms Co.* (1). In *Dixon's* case the House of Lords held that "contractors with" the Crown could not be regarded as agents of the Crown for this purpose. Section 29 of the consolidating Act is clearly designed, first, to put contractors with the Crown on the same footing as agents of the Crown, and then to include in the all-embracing word "others" all persons who could not be brought within the definition of "contractors" or "agents." The argument for the licensors was really seeking to make the very width of the language used by the legislature a reason for putting a narrow interpretation on it, and so, as it seems to us, defeating the intention of Parliament. For these reasons, we are of opinion that the appeal fails.

du Parcq L.J. read the judgment of the Court (Scott and du Parcq L.JJ.(2), in the licensees' cross-appeal. The cross appeal is against the learned judge's decision on the second of the licensors' two main contentions, namely, that at the least they were entitled to a declaration that cl. 7 of the deed of July 5, 1935, relating to minimum royalties, was still effective. The licensees disputed this claim on the three grounds which are stated in Atkinson J.'s judgment (3). The learned judge rejected all three of the licensees' contentions.

As to the first two contentions, we find ourselves in complete agreement with the learned judge and we will add nothing to what he said. The third raises a much less simple question. The answer to it must depend on the construction of cl. 7, and the clause must, of course, be construed with reference to the facts known to the parties when the agreement was made. The argument for the licensees is simple. The minimum amount to be paid depends on a calculation, the end of which is to arrive at the appropriate fraction of the units' "full capacity." To find the "full capacity," one must start with the "maximum capacity." "Maximum capacity" appears to mean the greatest quantity which the units can produce in a fixed period of time when worked without interruption and with the largest possible amount of material.

(1) 1 App. Cas. 641, 642.

(2) Luxmoore L.J. became indisposed during the argument on the cross-appeal and did not take any further part in that appeal, the parties agreeing that the cross-appeal should be disposed of by the other two lords justices.

(3) [1943] K. B. 640–641.

The figure which represents this capacity is, no doubt, ascertainable, as Atkinson J. said, but that does not mean that there can be no doubt or dispute about it. The licensees say that it was, or might be, of importance to them that it should be the subject of a guarantee, and that, on the true construction of cl. 7, the declared and guaranteed maximum capacity was to be the only basis of the calculation. It was incumbent on the licensors to declare and guarantee the maximum capacity " upon installation of " each unit, which, by virtue of the interpretation clause, means " at the date of " the notice in writing which the licensor gives stating that " any unit is ready for operation, when such unit is ready " for operation." There is no provision in the contract permitting any other basis to be taken for the calculation. When, therefore, the licensors failed to give a declaration and guarantee, they made the calculation impossible and gave up, or lost, their right to minimum payments. Further, the licensees were entitled to a guarantee, if not absolutely, at least as a condition precedent to any liability to make minimum payments. It would be unjust that they should be compelled to make the payments without having had the guarantee on which the payments were conditional.

This is plainly a formidable argument. The licensors' first answer to it is that it is founded on a wrong view of the facts. The maximum capacity of each unit, they contend, was constant and invariable, as regular, if we understood them aright, and as predictable, as the movements of the earth itself. It cannot, therefore, have been the intention of the parties that the minimum payments should only be made if the declaration and guarantee were given. The contract, it is said, calls for payment apart from any conditions. The words of the clause are " the licensee shall pay," and, as to part of the period, the contract insists that the payments " shall never be " less " than the agreed sum. These words, it is suggested, lose their meaning if the obligation to pay can be avoided by reason of so trifling and immaterial a default as the omission to state a fact about which all were agreed. " Never, except " in certain circumstances " is, it was argued, a contradiction in terms. In truth (it is said) the licensees' obligation to pay a minimum sum and the licensors' obligation to give a guarantee were independent of each other, and the licensors' omission to give the guarantee had no effect on the licensees' liability to make the payments.

C. A.
1944
No-Nail Cases Proprietary, Ld. v. No-Nail Boxes, Ld.

In our opinion, this answer, which found favour with the learned judge, ought not to prevail. The learned judge was prepared to read the material words as if they were equivalent to "the maximum capacity of each unit, from which shall be "calculated the 'full capacity' of each unit based, etc., shall "be declared and guaranteed by the licensor upon installa-"tion." This is not, in our view, the natural construction of the words, though it might, perhaps, be acceptable if, in truth, the maximum capacity could be said to be as well-known to the parties as the number of seconds in an hour, but it is difficult to suppose that the contract would have stipulated for a guarantee of anything which was so obvious and so constant, and the evidence shows that there was no such certainty about a unit's maximum capacity. The licensors, in a letter written to their own solicitors on January 6, 1943, which was put in evidence at the trial, referring to the absence of any declaration of guarantee, said: "May be verbal mention has been made of a "production of eight to nine boxes per minute, but we cannot "trace any correspondence confirming any statement being "made." It was rightly observed by counsel for the licensees that there would be a very substantial difference between the amount payable according as a production of eight or of nine boxes was taken as the basis of the calculation to be made. In the light of this letter, and of the other evidence, we are satisfied that the meaning which prima facie the words bear must be attributed to them, and that there could be no calculation of minimum payments, and, therefore, no minimum payments, in the absence of a declaration and guarantee. The clause is so framed as to make the obligation to give the guarantee and the obligation to make minimum payments interdependent. The second cannot stand if the first is not performed. If the contract had called for the certificate of an engineer instead of a declaration and guarantee by the licensors, the licensors' contention would have been unarguable, and for the present purpose either stipulation must, in our opinion, lead to the same result by the application of the same principle of construction.

The only question now left for consideration is whether the licensees by their conduct waived the requirement of a declaration and guarantee. The learned judge would have been prepared to hold that a waiver was established if he had thought that the question arose. In our opinion, there was no evidence of waiver. The mere fact that the licensees did not demand a

C. A.

1944

No-Nail Cases Proprietary, Ld. v. No-Nail Boxes, Ld.

declaration and guarantee cannot amount to a waiver, even if it be inferred that they did not demand them because they did not want them. A similar point arose in *Coombe* v. *Greene* (1), decided by the Court of Exchequer in 1843. There the appointment of a surveyor by the defendant was a " preliminary step " without which the plaintiff could not perform his obligation. The declaration did not allege that a surveyor had been appointed, but did allege that the plaintiff was at all material times ready and willing to appoint one, " of which the " defendant during all that time had due notice." On demurrer the court held that, as the declaration did not aver any such appointment to have taken place, there must be judgment for the defendant. It is unfortunate for the licensors that it did not occur to them to carry out strictly the terms of their bargain, and it may be that the licensees have had a lucky escape, but we do not find it possible to avoid the conclusion that the claim for minimum payments must fail. To adopt the learned judge's construction of the contract would be, we think, equivalent to re-writing it. There was a faint suggestion that the licensees were (as the reply alleged) " estopped from relying " upon any failure by the [licensors] to declare or guarantee " the maximum capacity " of the units, but it was, we think ultimately conceded that this replication could not be maintained. There was no evidence of any words or conduct on the part of the licensees which had caused the licensors to omit to give the declaration and guarantee when they should have done so, that is, at the date of each installation. Any subsequent words or conduct must be irrelevant for this purpose.

In our judgment the cross appeal succeeds. The appeal will, therefore, be dismissed and the cross appeal allowed, in each case with costs. The order made by Atkinson J. must be set aside and judgment entered for the licensees with costs.

Appeal dismissed.
Cross appeal allowed.

Solicitors for licensors : *Markby, Stewart & Wadesons.*
Solicitors for licensees : *George Martin & Co.*
Solicitor for Crown : *Treasury Solicitor.*

R. F. S.

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(1) (1843) 11 M. & W. 480.

C. A.

1944
May 5, 12.

Scott, Goddard and du Parcq L.JJ.

In re DECISION OF WALKER.

Local government—Remuneration of officers—" Reasonable remuneration" —Allowances for children—Legality—Discretion of local authority—Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 106, *sub-s.* 2.

The Birmingham City Council, having received a request from their non-manual staff for increased remuneration to meet the increased cost of living due to the war, adopted a recommendation by its Salaries, Wages and Labour Committee to increase generally in a modified degree the existing war bonus, and also, in the case of married men, widowers and widows, to pay an allowance of 2*s.* 6*d.* per week for each child under fourteen years of age or under eighteen if undergoing full-time education. The district auditor of the Ministry of Health disallowed the payments for children's allowances on the ground that they were not salary or remuneration within the meaning of the Local Government Act, 1933; that they had no relation to the services rendered to the council by the recipients; that the council, in exercising its discretion under s. 106 of the Act, had taken into consideration an extraneous matter, namely, the living expenses of the recipient; and that, therefore, the payments were contrary to law:—

Held, that the children's allowance was part of the wages of the recipient; that the court must have regard to the amount of the wages and not to the motive which led to that amount being paid; and that, the amount in itself not being unreasonable, the court could not interfere with the exercise by the council of their wide statutory discretion.

Decision of Divisional Court (Viscount Caldecote C.J., and Atkinson J.), ante p. 173, affirmed.

APPEAL from Divisional Court (1).

At meetings between representatives of the non-manual staff of the Birmingham City Council and representatives of the council, proposals were made by the former for a revision of salaries to meet the increased cost of living due to the war. In due course the Salaries Wages and Labour Committee recommended to the council a modified general increase in the scale of war bonuses for the permanent non-manual staffs, plus, in the case of married men, widowers and widows, an allowance of 6*l.* 10*s.* 0*d.* per annum, or 2*s.* 6*d.* per week, for each child under fourteen years of age or under eighteen years if still undergoing full-time education. On October 14, 1941, the council approved the report of the committee, and subsequently, by resolution, extended the children's allowance to their temporary staff after three months' service. The district auditor, Mr. Walker, disallowed the payments for children's allowances and by arrangement surcharged the Lord Mayor and two other members of the council, jointly and severally, in the sum of 48*l*. 13*s*. 8*d*. The grounds of the auditor's decision were that the children's allowances were not salary or remuneration within the meaning of s. 106, sub-s. 2 of the Local Government Act, 1933; that they had no relation to the services rendered to the council by the recipients; that the council in the exercise of their discretion had taken into consideration an extraneous matter, namely, the living expenses of the recipient; and that, therefore, the payments were contrary to law. The corporation appealed to the Divisional Court, and on December 9, 1943, that court (Viscount Caldecote C.J., and Atkinson J.) allowed the motion and quashed the disallowances and surcharges. The district auditor appealed.

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(1) Ante p. 173.

Sidney Turner K.C. and *Simes* for the district auditor. The limits of discretion may depend on the character of the body exercising it, i.e., whether it is a public representative body, like a municipal corporation, or a trading corporation, such as a railway company. A second consideration is the subject-matter in respect of which the discretion is to be exercised. A distinction is to be drawn between a discretion to make bye-laws, which may be subject to ministerial approval, and a discretion to deal with public funds which are impressed with a trust. It is also necessary to consider what are the checks and safeguards provided by the legislature subject to which the discretion has to be exercised. In the present case the corporation is a public representative body and is dealing with public funds, and the only check on their discretion is through the medium of the district auditor. The authorities show that the statutory discretion of the corporation can in no circumstances extend to the inclusion of payments which, like these children's allowances, are not remuneration or salaries at all. The corporation have purported to pay these allowances as part of the remuneration of certain of their officers. The auditor, being of the opinion that they were not in accordance with the law, was bound to disallow them, and his decision should be upheld. He based his decision on *Roberts* v. *Hopwood* (1) and in particular on the following passage from the speech of Lord Wrenbury (2): "The cardinal word upon which "emphasis is principally to be laid is the word wages . . . .

(1) [1925] A. C. 578.

(2) Ibid p. 612.

C. A.

1944

Decision of Walker. In re.

"Wages in a particular service are such sum as a reasonable "person, guiding himself by an investigation of the current rate "in fact found to be paid in the particular industry, and acting "upon the principle that efficient service is better commanded "by paying an efficient wage, would find to be the proper sum ". . . . It is such a figure as is the reasonable pecuniary "equivalent of the service rendered. Anything beyond this is "not wages. It is an addition to wages, and is a gratuity." The question what is reasonable is, in the first instance, one for the auditor. If he comes to the conclusion that there should be a surcharge, then under the statute there is provision for moving the matter into the High Court and the courts must then be the judges of reasonableness. [du Parcq L.J. :—Is not an act reasonably done by a local authority if it does what a body of men honestly applying their minds to the problem might do ?] In one sense, yes, but it cannot be reasonable to take into account an extraneous matter. These allowances are not remuneration at all. Remuneration is payment for services rendered and any payment which is related, not to services, but to some extraneous matter, cannot come within the definition of remuneration as given by Lord Wrenbury. Even if these payments are remuneration, they are not reasonable remuneration, for they have no relation to the value of the services rendered, and, moreover, they are based on the consideration of an extraneous matter. If the payments are not remuneration or reasonable remuneration, there is no statutory authority to make them. They can only be legalised by a special Act of Parliament, as was done in the case of local government staffs war service payments, to legalise which the Local Government Staffs (War Service) Act, 1939, was passed. The fact that these allowances are paid in good faith is not relevant, except on the question whether relief in respect of the surcharges should be granted, and to that no objection is offered. These payments are really gifts and for that reason also are unlawful. Being unlawful they cannot be rendered lawful by the fact that the corporation could lawfully have given their officers more by way of increased salaries. [*Kruse* v. *Johnson* (1) ; *Reg.* v. *Vestry of St. Pancras* (2) ; *Short* v. *Poole Corporation* (3) ; *National Association of Local Government Officers* v. *Bolton Corporation* (4) were also referred to.]

Fitzgerald K.C. and *Neep* for the corporation. The corpora-

(1) [1898] 2 Q. B. 91.

(2) (1890) 24 Q. B. D. 371.

(3) [1926] 1 Ch. 66.

(4) [1943] A. C. 166.

tion were acting lawfully under s. 106 of the Local Government Act, 1933, which by sub-s. 2, empowered them to pay to an officer appointed under that section such reasonable remuneration as they might determine. The word "they" is fundamental to the case of the corporation. Both on the words of the statute and the authorities, it is for the corporation, and not for the auditor or the court, to determine what is reasonable remuneration, and unless the corporation act with such an excessive degree of unreasonableness that it can be said, as was said in *Roberts* v. *Hopwood* (1), that they were not exercising their discretion at all, the courts will not interfere. *Roberts* v. *Hopwood* (1) is distinguishable. There the council, regardless of the market rate for labour and of the services rendered, determined that 4*l*. per week was the lowest wage any worker should receive. In one sense the present appeal borders on the fantastic. What the district auditor in effect says is that, instead of paying children's allowances, the corporation should pay to all its officers a basic war bonus of 11*s*. 6*d*. per week, thus paying children's allowances to bachelors. That would cost the corporation thousands of pounds more a year. The corporation, bearing in mind that they were trustees for the ratepayers, came to the conclusion that their object of maintaining an efficient and contented staff would best be effected by adopting a method of remuneration which would save the ratepayers 5,000*l*. to 6,000*l*. a year. Having regard to the powers given to them by Parliament they were amply justified in doing so. In the ordinary sense of the word the allowances are clearly remuneration for services rendered. As to whether the remuneration is reasonable and the principle to be applied in determining what is reasonable, see *Kruse* v. *Johnson* (2). That case is always quoted as an authority on the way in which the courts should determine whether the discretion is exercised reasonably, and in the *Poplar* case (3) was so cited as an authority by Lord Buckmaster. When Parliament has given a local authority power to determine the pay of their officers, anyone who wishes to challenge the exercise of that discretion by the authority must prove that it has been wrongly exercised. So long as the discretion has been exercised and its limits are not exceeded, the decision rests with the local authority: see per Pollock M.R., in *Short* v. *Poole Corporation* (4).

Cur. adv. vult.

(1) [1925] A. C. 578.
(2) [1898] 2 Q. B. 91.
(3) [1925] A. C. at p. 588.
(4) [1926] 1 Ch. 66, 88.

May 12. The following judgments were read.

SCOTT L.J. I have read and considered with care the judgments of my brethren. I agree with them entirely, and only add that it would have been matter for grave regret if, as judges, we had felt bound to interpret the relevant statutory provisions as excluding that broad and human view of the meaning of remuneration payable by employer to employed which, I am satisfied, was intended by Parliament. The appeal will be dismissed for the reasons given by my brethren.

GODDARD L.J. At the conclusion of the argument in this case I readily admit that I was inclined to the view that this appeal ought to be allowed. I was impressed with the argument of Mr. Turner that, as children's allowances could have no relation to the value of the employee's services, payment of them to officers and servants could not be regarded, to use Lord Wrenbury's words in *Roberts* v. *Hopwood* (1), as a pecuniary return for services rendered, but, on reflection, I am satisfied that this is not the proper approach to the question that we have to determine. I think the solution of the problem is to be found in a passage of Lord Sumner's speech in the case just mentioned and in a passage of Atkinson J.'s judgment in the Divisional Court in the present case, to both of which I will refer in a moment.

First of all, however they are made up, the sums paid by the corporation to their servants are wages. If one of the servants were not paid in a particular month or week his cause of action would be for wages and nothing else. The corporation have agreed to pay Mr. S., to take one instance, 481*l.* 19*s.* 8*d.* a year, or roughly, 40*l.* a month, and, if he had to sue, it would properly be described as an action for wages. He would not sue for wages plus children's allowance. The amounts paid would be properly entered in the books of the corporation as wages. When the audit is held it is the duty of the auditor to disallow any item of account contrary to law. If the sum paid for wages is reasonable in amount, can the auditor inquire into the motive of the corporation that induced them to agree to that particular amount? In this connexion the passage in Lord Sumner's speech in *Roberts* v. *Hopwood* (2) seems to me to be decisive. He said: "If, having examined the expenditure and found "clear proof of bad faith, which admittedly would open the

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(1) [1925] A. C. 578, 612.

(2) [1925] A. C. 578, 604.

"account, the auditor further found that the councillors' evil "minds had missed their mark, and the expenditure itself was "right, then the expenditure still would not be 'contrary to "'law' and could not be disallowed. Bad faith admittedly "vitiates the council's purported exercise of its discretion, but "the auditor is not confined to asking, if the discretion, such as "it may be, has been honestly exercised. He has to restrain "expenditure within proper limits. His mission is to inquire "if there is any excess over what is reasonable."

These concluding words seem to me to be of paramount importance. Here there is, of course, no question of bad faith, but a payment not authorized by law is, for this purpose, on the same footing and equally would serve to reopen the account. Now, if an amount paid in wages is reasonable, the expenditure is right and is not contrary to law and cannot be disallowed. This seems to me to show that it is the amount of the wages to which regard must be had and not the motive which led to that amount being paid. For instance, suppose a local authority had been paying some of their workmen rather less than the trade union rate, and the men had been content because their employment was secure. If the council subsequently decided that they would for the future pay the prevailing trade union rate to married men, no one could say that such a rate was unreasonable, and, accordingly, it would not be for the auditor to inquire why they were paying it. A war bonus is recognized as a reasonable addition to a man's pre-war wage. The bonus granted by this corporation is by no means equivalent to the whole difference between the purchasing power of a man's wage before the war and the present day. The auditor does not suggest that the amount, as an amount, is unreasonable. So, in my opinion, the concluding words of Atkinson J.'s judgment neatly and accurately state the position. He says (1): "If the council had brought every salary right up to the pre-"war value, they would have been within their rights. That is "clear from the Poplar case. If so it must be within their "power to bring some only of the salaries (those of the hardest "hit) up to pre-war value, and, of course, still more must it "be within their power to bring those salaries part way up to "pre-war value." How or why they arrive at that particular figure is, in my opinion, irrelevant. If the result is a reasonable sum, that is enough to justify the payment. Were a sum to be added to that which was the limit of reasonableness to further some policy of social reform, which was, in effect, what the Poplar council attempted in the leading case, different considerations would arise, and that case shows that such an action is unlawful. That is not the case here, and, in my opinion, the appeal should be dismissed.

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(1) Ante pp. 187, 188.

du Parcq L.J. In this case I find myself so completely in agreement with both the Lord Chief Justice and Atkinson J. that I would be content respectfully to adopt their reasons as my own, but it is right that I should add some words of my own in deference to the very able argument which we heard from Mr. Turner. That argument and the decision of the auditor were based mainly on passages from the speeches of the learned lords in *Roberts* v. *Hopwood* (1). That case made it clear that a local authority cannot be said to be acting in the lawful exercise of its discretion to fix wages when it grants to its employees, nominally as wages, amounts arrived at arbitrarily, without consideration of any of those matters which an employer, acting reasonably, would normally take into account. The members of a local authority who thus disregard their duty render themselves liable to a surcharge. As I understand the decision, however, it does not follow that expenditure may properly be disallowed or a surcharge levied whenever the local authority's reasons for the expenditure are ill-advised, stupid or even (it may be) dishonest. This, at any rate, seems to have been the view of Lord Sumner, who said that, where there was clear proof of bad faith, the expenditure might yet be right in itself, in which case it " would not be contrary to law " and " would not be disallowed."

The following further observations with regard to *Roberts* v. *Hopwood* (1) may, I think, properly be made: First, that decision re-affirmed the well-established proposition that the statutory discretion as to the reasonable nature of the wages is to be exercised by the local authority and no-one else, that it is a " very wide " discretion, and that " the court ought to show " great reluctance before they attempt to determine how, in " their opinion, the discretion ought to be exercised " : see per Lord Buckmaster and Lord Carson (2). Secondly, what is a reasonable wage must depend on the circumstances presently existing in the labour market. In assessing it, the local authority is entitled to be generous: see per Lord Atkinson (3). The value of the employee's work may, in Lord Buckmaster's

(1) [1925] A. C. 578.
(2) Ibid. pp. 588, 616.
(3) Ibid. p. 600.

C. A.

1944

DECISION OF WALKER. *In re.*

du Parcq L.J.

words, be " generously measured," though generosity must not (as Lord Wrenbury put it) be " stripped of commercial con-" siderations " (1). One of the matters which it is clearly right to take into consideration is the cost of living. " It is " but right and natural that the rate of wages should rise if the " cost of living rises " : per Lord Atkinson (2). Thirdly, it may, I think, be deduced from the speeches of the learned lords that a local authority not only may, but ought to, have regard to the practice of private employers. The practice of such employers is one of the relevant circumstances which exist in the labour market, and it may generally be assumed that a private employer is guided by commercial rather than philanthropic motives since, to quote Lord Sumner, he " must make " both ends meet and has not the ratepayers' purse to draw " on." (3) I would add, as a corollary to these propositions, that the local authority must be judged according to prevailing practices and conditions. The practice of collective bargaining between associations of employers and workers has greatly developed in the present century. It is nowadays often impossible to regard the employment of each individual worker as the result of a separate bargain struck between master and servant. It is commonly convenient and satisfactory to settle wages by means of negotiations and discussion between the representatives of employers and employed. In the case of local authorities it appears that it is customary to establish joint committees for this very purpose. The evidence shows that the salaries now in question were paid as a result of the recommendation of such a joint committee, who thought it expedient, instead of granting the general increase in salaries which the cost of living would have justified, to grant a smaller increase to men without children, and to add what are called " children's allowances " to the salaries of married men with children. In so doing the Birmingham Corporation, far from setting themselves up as model employers, are following the example of many of the joint stock banks and insurance companies. If local authorities were to be debarred from following a course which has commended itself to such profit-making employers, it is possible that they might be seriously hampered in their efforts to obtain the best services available and that the efficiency of local government would suffer accordingly.

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(1) Ibid pp. 590, 612.

(2) Ibid p. 592.

(3) Ibid p. 609.

If the corporation, in the course of bargaining with separate individuals whose services it was anxious to obtain or to retain, had felt that it could properly offer a smaller sum to a man who was a bachelor than a married man with children would be likely to accept, it might have incurred reproach for undue parsimony, but it could hardly have been said to be acting unreasonably. If, as between two applicants, one a bachelor, the other a married man with children, it found that it could obtain the services of the former for rather less than it had proposed to pay and that of the latter for a little more, it could not have been said to be acting uncommercially or with any excess of philanthropy if it had struck a bargain with each of them on the terms which he proposed. Here the corporation has approved a collective bargain by which, in lieu of a flat rate of increase, the workers accept a graduated increase with discrimination in favour of men with families. This court is not concerned to inquire whether this was a wise arrangement, or might have been improved on. The question is whether the salaries of which complaint is made so manifestly exceed any sums which could have been arrived at on economic principles that the district auditor or the court can override the decision of the local authority.

If the corporation, having fixed salaries at a flat rate for everybody on a basis which would fairly meet the demands of the men with families, had resolved to give an additional annual bonus to its married servants on the birth of each child with a view to increasing the birth-rate in Birmingham, I would have agreed that such payments were not properly to be described as " remuneration " and certainly could not be called " reasonable " remuneration." It is clear, however, that the corporation were not influenced by any such political or sociological motive. Indeed, one of the district auditor's criticisms is that the corporation may be tempted to give a preference to the unmarried and the childless. In my opinion, the view of the facts taken by the Lord Chief Justice and by Atkinson J. is correct. " The so-called children's allowances," said the Lord Chief Justice, " are additions in each particular case in which " they are given, to the basic salary and cost of living bonus, " though this part of the salary is calculated by reference to " the needs and circumstances of each employee " (1).

It was argued in support of the district auditor's objection that when the corporation took into account the number of an

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(1) Ante p. 181.

C. A.

1944

DECISION OF WALKER.

In re.

du Parcq L.J.

employee's children, it was taking into account what were called "extraneous matters." The answer to this argument was given by Atkinson J. who pointed out that increased cost of living was clearly a matter which must be taken into consideration in fixing salaries, and added: "If increased cost of living is a "matter properly calling for the consideration of the employer, "it must be relevant to ascertain to what extent any particular "applicant or class of applicants is affected by the increase" (1). I respectfully agree, and I think that it is quite fallacious to argue, as counsel for the appellant did, that, because the way in which an employee spends his money does not concern the employer, therefore the circumstances and responsibilities of an employee are irrelevant to the fixing of his salary. No employer can altogether avoid answering the question: "What "is the minimum salary which a suitable candidate for employ-"ment is likely to accept without reluctance and without "dissatisfaction?" That question cannot be answered without forming an estimate of the amount which the employed person will need to maintain a reasonable standard of life for himself and his dependants. It was further urged that the salaries complained of must necessarily be regarded as unreasonable because there was shown to be inequality of payment for the same or similar services. This may mean that the men without children are being paid too little rather than that the men with children are being paid too much, and I find a difficulty in seeing how the mere fact of such inequality can be said to show that the council has exceeded its powers. If it were true to say that, because A. and B. do the same work for the same employer and B. is more highly paid than A., therefore part of B.'s so-called remuneration must be a mere gratuity, many employers would be surprised to find themselves branded as philanthropists.

It seems to have been assumed in *Roberts* v. *Hopwood* (2) that unequal pay for equal services was the rule rather than the exception in commercial practice. Lord Buckmaster, indeed, thought that a council might without impropriety pay "the "same wage for the same work without regard to the sex or "condition of the person who performed it" (3), but he certainly did not suggest that "the condition" of the worker might not properly be treated as a ground for discrimination, and Lord Atkinson's view appears to have been that discrimina-

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(1) Ante p. 186.

(2) [1925] A. C. 578.

(3) Ibid p. 590.

C. A.
1944
Decision of Walker. In re.
du Parcq L.J.

tion, at any rate between the sexes, was necessary to comply with the law (1). Conditions and commercial practice may well have changed since 1925, but, if it was then not only permissible but right to differentiate between workers on the ground of sex, it can hardly now be unreasonable and necessarily unlawful to discriminate in favour of men with children.

Finally, I wish to express my agreement with the concluding passage of Atkinson J.'s judgment which, in my opinion, contains a complete answer to the auditor's case. I agree with the learned judge that, if the council had brought every salary up to its pre-war value, they would have been within their rights. " If so," he added, " it must be within their power to " bring some only of the salaries (the salaries of the hardest " hit) up to pre-war value and, of course, still more must it be " within their power to bring those salaries part way up to " pre-war value." (2) Whether, as a matter of public policy or economic orthodoxy, it would have been wiser to raise all salaries equally is a question which does not concern the courts or the district auditor. I certainly do not feel myself entitled, and am happy to think that I am not bound, to express any opinion on it. I would dismiss the appeal.

Appeal dismissed.

Solicitors for district auditor : *Bircham & Co.*

Solicitors for Birmingham Corporation : *Sharpe, Pritchard & Co., for Town Clerk, Birmingham.*

(1) [1925] A.C. p. 594. (2) Ante p. 187.

A. W. G.

1944
May 4, 12.
Lawrence J.

DANZIGER *v.* THOMPSON AND OTHERS.

Landlord and tenant—Evidence—Admissibility—Person described as " tenant " in written agreement for letting—Oral evidence to prove that person an agent.

A person was described in a tenancy agreement as the " tenant " of the premises :—

Held, that, oral evidence was admissible to show that the person entered into the agreement as the agent or nominee of another.

Action tried by Lawrence J.

The plaintiff claimed 247*l.* 12*s.* arrears of rent from

R. J. Thompson, Maud Thompson, his wife, and Dulcie Thompson, their daughter, or one or other of them, in respect of a flat and premises, No. 3A Belle Vue Gardens, Clapham Road, London, let at a weekly rental of 1*l*. 18*s*. 0*d*. payable in advance under an agreement in writing, dated July 21, 1939, and expressed to be made between the plaintiff, Elizabeth Danziger, and Dulcie Thompson who was therein described as the " tenant." Dulcie Thompson, by her defence, admitted liability for 234*l*. R. J. Thompson and Maud Thompson, by their defence, denied that Dulcie Thompson entered into the agreement as agent for them or either of them or that she had authority to do so. Dulcie Thompson was born on December 5, 1920, and, therefore, on July 21, 1939, was an infant.

The plaintiff tendered evidence that Maud Thompson, acting on behalf of R. J. Thompson had agreed with the agent of the plaintiff that R. J. Thompson should take the flat in the name of Dulcie Thompson. Objection was taken on behalf of R. J. Thompson and Maud Thompson that no evidence was admissible to show that Dulcie Thompson entered into the agreement as agent for them or either of them because that evidence would contradict the description of Dulcie Thompson in the agreement as the " tenant " of the premises.

T. F. Davis for R. J. Thompson and Maud Thompson. Extrinsic evidence cannot be received to prove that a person who appears on the face of a document to be a principal is, in fact, an agent, so as to make some other person liable as principal: *Humble* v. *Hunter* (1); *Formby Brothers* v. *Formby* (2). In *Fred Drughorn, Ld.* v. *Rederiaktiebolaget Trans-Atlantic* (3) evidence was admitted that the plaintiffs were the undisclosed principals of a person described in a charterparty as the " charterer," but Lord Haldane said (4): " A charterparty is not a lease—it is a chattel that is being " dealt with, a chattel that is essentially a mere subject of " contract; and although rights of ownership or rights akin " to ownership may be given under it, prima facie it is a " contract for the hiring or use of a vessel." Dulcie Thompson was described in the agreement for the letting of this flat as " the tenant " and, once she had entered, she was the tenant of the flat, that is, she held a legal estate in land:

(1) (1848) 12 Q. B. 310.
(2) (1910) 102 L. T. 116.
(3) [1919] A. C. 203.
(4) Ibid. 207.

see ss. 1 and 205 (xxvii.), of the Law of Property Act, 1925; *Chapman* v. *Smith* (1).

P. B. Morle for the plaintiff. Where an agent enters into a written contract in his own name, parol evidence is admissible to show who is the real principal so as to charge him, provided that such evidence is not inconsistent with the terms of the written contract: see Bowstead on Agency, 9th ed., p. 225. The question is one of construction in view of the circumstances as Parker J. said in *Chapman* v. *Smith* (2). In *Fred Drughorn, Ld.* v. *Rederiaktiebolaget Trans-Atlantic* (3), Lord Haldane pointed out that where the word used in the contract is "owner" or "proprietor" evidence is not admissible to show that some other person was contracting as owner or proprietor, but that was a question, not of agency, but of property at a time before the contract had been agreed. The description "tenant" bears no such implication.

T. F. Davis replied.

Cur. adv. vult.

LAWRENCE J. read a judgment in which he found that the evidence tendered by the plaintiff to which objection was taken was true and also that Dulcie Thompson had been represented to the plaintiff's agent as being of age, and continued: I am of opinion that this evidence is admissible. The description "tenant" does not imply that the person so described is not acting as an agent or nominee. As Lord Haldane pointed out in *Fred Drughorn, Ld.* v. *Rederiaktiebolaget Trans-Atlantic* (3) the description of a party to a contract as owner or proprietor of certain property does imply that at the time of entering into the contract he is the owner or proprietor of the property and evidence that that party is the agent of the owner or proprietor and not the owner or proprietor himself contradicts the written contract. It is, as Lord Haldane says, not a question of agency, but one of property, and as Lord Sumner pointed out (4), a question of property, not after the contract has been entered into but before the time it is entered into. It is true that Lord Haldane contrasts a charterparty with a lease (5), but, as he was there dealing with a charterer and with the right of a principal to the benefit of a charterparty made by his agent, he must, I think, have

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(1) [1907] 2 Ch. 97.

(2) Ibid. 102.

(3) [1919] A. C. 206–7.

(4) Ibid. 210.

(5) Ibid. 207.

1944

DANZIGER
v.
THOMPSON.

Lawrence J.

been referring to a lessor and the description "lessor" does imply an antecedent interest in the property, whereas the description "lessee" or "tenant" does not. In my opinion, the description "tenant" no more negatives agency than would the description "contracting party." As Lord Sumner said (1) about the description "charterer," the description "tenant" means the person "who by this contract becomes "liable to the obligations and entitled to the rights, which "this contract allots to the" tenant, and, as Lord Sumner and the House of Lords held, such a description is not inconsistent with a person so described being an agent. For these reasons, I am of opinion that the evidence was admissible and I give judgment for the plaintiff against R. J. Thompson with costs. There will be judgment for Maud Thompson and Dulcie Thompson, without costs. The plaintiff will have the costs of the action.

Judgment accordingly.

Solicitors for plaintiffs: *Soames, Edwards & Jones.*
Solicitors for defendants: *Freeman & Co.*

C. G. M.

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(1) [1919] A. C. 210.

LAND SETTLEMENT ASSOCIATION, LIMITED *v.* CARR.

C. A.

1944
May 11, 12;
June 27.

Scott, MacKinnon and Luxmoore L.JJ.

Agriculture—Agricultural holding—"Contract of tenancy"—Letting for term of years or from year to year—Letting for successive periods of 364 *days—Agricultural Holdings Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 25, *sub-s.* 1, *s.* 57, *sub-s.* 1.

By an agreement, dated October 20, 1939, the plaintiff association, which was incorporated to organize a small holding scheme, let a house and plot of land to the defendant. The term granted by the agreement was "from October 1, 1939, to September 29, "1940, and thenceforward from September 30, 1940, for the term "of 364 days and thereafter for successive periods of 364 days "from September 29, 1941." The agreement was expressed to be terminable "by either party at any time during the currency of "the said term or any successive period by giving to the other "three calendar months' notice to quit in writing." On August 25, 1943, the association served a notice to quit on the defendant requiring him to deliver up possession on November 30, 1943. The defendant having failed to comply with the notice, the association brought an action in the county court in which they claimed possession and mesne profits. The defendant alleged that the demised premises were a " holding " within the meaning of s. 57, sub-s. 1, of the Agricultural Holdings Act, 1923, that the agreement of October 20, 1939, was a " contract of tenancy " within the meaning of the sub-section as being a tenancy either for a term of years or from year to year, and that, therefore, the notice to quit was invalid by reason of the provisions of s. 25, sub-s. 1, of the Act :—

Held, that the term granted by the agreement was neither a tenancy for a term of years nor from year to year, and, therefore, was not a " contract of tenancy " within s. 57, sub-s. 1, of the Act and was not affected by the provisions of s. 25, sub-s. 1.

APPEAL from Carlisle county court.

The plaintiffs, the Land Settlement Association, Ld., were incorporated at the instance of the Minister of Agriculture and Fisheries to organize a small holding scheme on a co-operative basis for the benefit of unemployed workmen and their families. By an agreement, dated October 20, 1939, the association agreed to let to the defendant, J. Carr, a small holding on an estate held by them at Dalston, Cumberland, consisting of a house, five acres of land, and equipment suitable for a mixed small holding. The agreement contained a recital that " nothing in this agreement shall be construed as constituting " a contract of tenancy within the meaning of the Agricultural " Holdings Act, 1923, or any statutory modification thereof." By cl. (1.) it provided that : " The association shall let and the " tenant shall take the land and property described in the " schedule hereto . . . . to hold the same from October 1, " 1939, to September 29, 1940, and thenceforward from " September 30, 1940, for the term of 364 days and thereafter " for successive periods of 364 days from September 29, 1941, " determinable nevertheless as hereinafter mentioned " : By cl. (2.) : " This agreement may be determined by either party " at any time during the currency of the said term or any " successive period giving to the other three calendar months' " previous notice to quit in writing." By cl. (3.) : " The rent " shall be 33*l.* 12*s.* for the tenancy period of 364 days and " shall be payable in equal monthly payments of 2*l.* 16*s.* such " payments to be made on the last day in each month the " first payment of 2*l.* 16*s.* to be made on October 31, 1939, and " the last payment to be made in advance on the thirtieth day " next preceding the determination of the tenancy together " with the payment which falls due on that day." On

August 25, 1943, the association served on the defendant a notice in writing, dated August 23, 1943, requiring him to quit and deliver up possession of the holding on November 30, 1943. The defendant having failed to comply with the notice, the association brought an action against him in the county court, in which they claimed possession of the holding and mesne profits. The defendant alleged that the demised premises were a holding within the meaning of s. 57, sub-s. 1, of the Agricultural Holdings Act, 1923; that the agreement of October 20, 1939, was a "contract of tenancy" within the meaning of the sub-section (1) as being a tenancy either for "a term of years" or "from year to year"; and that, therefore, the notice to quit given under the agreement of October 20, 1939, was rendered invalid by s. 25, sub-s. 1, of the Act. The county court judge held that the letting did not come within the provisions of the Agricultural Holdings Act, 1923, and that the notice to quit given to the defendant was valid. He, therefore, gave judgment for the association for possession within three months and for 5*l.* 2*s.*, the amount of mesne profits claimed. The defendant appealed.

P. C. Lamb for the defendant.
Valentine Holmes and *Diplock* for the association.

Cur. adv. vult.

June 27. The following judgments were read.

SCOTT L.J. The only question before the court is whether a notice to quit dated August 23, 1943, and served on the defendant two days later, requiring him to give up possession of his holding on November 30, 1943, was an invalid notice. That would be so if it fell within the ban of s. 25, sub-s. 1, of the Agricultural Holdings Act, 1923. There was an alternative

(1) Agricultural Holdings Act, 1923, s. 25, sub-s. 1: "Notwithstanding any provision in a "contract of tenancy to the contrary, a notice to quit a holding "shall be invalid if it purports to "terminate the tenancy before "the expiration of twelve months "from the end of the then current "year of tenancy; . . . ."

By s. 57, sub-s. 1: "In this Act "unless the context otherwise "requires—'Contract of tenancy' "means a letting of or agreement "for letting land for a term of "years, or for lives, or for lives "and years, or from year to "year: . . . ."

contention that it was bad in itself, but, in my view, the only arguable point is the former. A further defence based on the Rent Restriction Acts was dropped.

The plaintiff association owns an estate at Dalston, Cumberland, acquired by it to encourage a co-operative system of running small holdings in which the association, owning the land, lets it on conditions in regard to supervision, guidance, cropping and marketing, calculated to promote the success of the small holders to a degree which it is well-known has proved unattainable in this country by small holders trying to run independently and without such assistance and control. The defendant's plot was known as " Holding No. 50." After a preliminary period of trial in 1938, it was let to him on the association's regular printed form of tenancy agreement on October 20, 1939. It was contended by Mr. Lamb, for the defendant, that cl. 1 created a tenancy either (*a*) for a term of years, or (*b*) from year to year. In either case the notice of August 23, 1943, would be bad. It is obvious that the agreement of October 20, 1939, was necessarily drawn with the intention of avoiding the operation of an Act which is radically incompatible with the whole scheme of the settlement. The Act was intended for the typical farmer or market-gardener, carrying on his business independently and in competition, on a landlord and tenant basis. Such tenants were thought by Parliament to need the sort of protection the Act gave them, but that protection would at once be fatal to the co-operative form of farming for which the Land Settlement Association stands. The antithesis is made plain by the recitals, and para. (ii.) of the fourth recital says: " Nothing in this agree-" ment shall be construed as constituting a contract of tenancy " within the meaning of the Agricultural Holdings Act 1923 " or any statutory modification thereof."

The purpose of the wording of cl. 1 is obviously to avoid creating either a term of years or a tenancy from year to year. It refers to and must be read with cl. 2. So read, it provides, in my opinion, not for any term, but for a periodic tenancy—using the word " periodic " as it would apply to a weekly or a monthly tenancy (but without the ambiguity of the word " month "). As Mr. Holmes put it, cl. 1 (read without cl. 2) is for a period of 364 days to—another like period. It is clear that that is not a tenancy " from year to year," " But," says Mr. Lamb, " if the first period of 364 days is to be followed " by a like period, and the second by a third, you get to a total "tenancy over two years and that is a term of years." I do not agree. The notice to quit of August 23, 1943, which was a perfectly good notice under the agreement, did not offend against s. 25, sub-s. 1, of the Act, because that sub-section in terms presupposes a tenancy of which either the term or the periodicity is measured in years. There was no tenancy year which was "current" on August 23, 1943, as predicated by the sub-section, but only a period of 364 days which was then current. It was vital for the draughtsman of the agreement to steer clear of any tenancy which would allow the fatal provisions of the Act of 1923 to upset the association's power of control. I think he has succeeded.

There is a further point of construction. Clause 2 should, I think, be construed as permitting a determination of the tenancy at the will of either party at any time, subject only to three months' previous notice in writing. That, in itself, seems to me a corroborative reason for saying that the tenancy for "a term of years" intended by s. 57, sub-s. 1, of the Agricultural Holdings Act, 1923, was not such a tenancy as was the subject-matter of the association's printed form of agreement. It is true that there is authority for saying that, if a contract of tenancy indubitably contains a terminus ad quem sufficiently certain to satisfy the phrase "term of years," the certainty of the end will not be affected by a power to determine earlier, but Mr. Lamb is in the difficulty of being unable to find in cl. 1 any "term" to the tenancy whatsoever. The tenancy is expressed to continue indefinitely, period by period, subject only to the right of either party to bring it to an end at any time by a three months' notice. How can that be called a "term of years"? The mere presence in a tenancy agreement of expressions showing that the parties contemplated (as in the agreement of October 20, 1939) that it would last for more than one year does not make a yearly tenancy become a tenancy for two years at least: *Doe d. Plumer* v. *Mainby* (1). A fortiori does that observation apply to the bearing of the many expressions in the present agreement showing expectation that the relationship would continue for many years. That expectation is irrelevant to the question we have to decide.

Many of the ancient authorities about a "term of years" were cited to us, but I will only deal with a few. Blackstone, treating of estates less than freehold (bk. II., p. 140), says:

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(1) (1847) 10 Q. B. 473.

"An estate for years is a contract for the possession of lands "or tenements, for some determinate period: and it takes "place where a man letteth them to another for the term of "a certain number of years, agreed upon between the lessor "and the lessee, and the lessee enters thereon. If the lease be "but for half a year, or a quarter, or any less time, this lessee "is respected as a tenant for years and is styled so in some legal "proceedings; a year being the shortest term which the law "in this case takes notice of." (Littleton, s. 67.) A little further on, at p. 143, he says: "Every estate which must "expire at a period certain and prefixed, by whatsoever words "created, is an estate for years. And therefore this estate is "frequently called a term, terminus, because its duration or "continuance is bounded, limited and determined: for "every such estate must have a certain beginning, and "certain end." (Co. Litt. 45*a*.) The passage in s. 67 of Littleton, to which Blackstone refers, is as follows, p. 52 (*c*): "Also, if tenements be let to a man for terms of halfe "a yeare, or for a quarter of a yeare, &c. in this case, "if the lessee commit waste the lessor shall have a writ of "waste against him, and the writ shall say, quod tenet ad "terminum annorum; but he shall have an especiall declara-"tion upon the truth of his matter, and the count shall not "abate the writ, because he cannot have any other writ upon "the matter." On p. 54 (*b*) under the caption "The writ "shall say," after explaining the impossibility of altering a writ, the author continues: "And this is the reason that in this "case of halfe a yeare the words of the writ, shall be without "change, quod tenet ad terminum annorum, and the pleader "must make a speciall declaration according to his case, for "otherwise he should be without remedy." Thus, it is plain that nothing short of a year was even at that period of our law regarded as really a "term of years," the attribution of the name being a procedural fiction. In the *Bishop of Bath's Case* (1), it was made clear that no time shorter than two years could constitute a "term of years": "So it is true, that the "continuance of it ought to be certain; but that is to be "intended either when the term is made certain by express "numbering of years, or by reference to a certainty, or by "reducing it to a certainty by matter ex post facto, or by "construction in law, by express limitation. . . . . But "if a man leases his land for years it is a good lease for two

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(1) (1606) 6 Co. Rep. 34*b*.

" years, because it shall be taken good for such a number " with which at least the plural number will be satisfied, and " that is with two years." Mr. Lamb argued that the definition XXVII. in s. 205, sub-s. 1, of the Law of Property Act, 1925, could be invoked to support his argument on the meaning of the Act of 1923, but that is a fallacy for three reasons. Even although the Act of 1925 repeated the Act of 1922 (which in 1925 was split up into its component divisions), the Agricultural Holdings Act, 1923, is not to be construed by reference to a definition in an entirely different Act inserted solely for the interpretation of words in the other Act. Secondly, the Act of 1923 was a consolidation Act and the definition of the phrase " contract of tenancy " came from an Act passed many years before the Law of Property Act, 1925, namely, the Agricultural Holdings Act, 1908, s. 48, sub-s. 1, of which contains the identical definition which is repeated in the Act of 1923. Thirdly, the Act of 1923 was a " special " Act and the Law of Property Act a general Act and " specialibus generalia non " derogant." The appeal must be dismissed with costs.

MACKINNON L.J. The plaintiff association entered into an agreement with the defendant dated October 20, 1939. By it they let to the defendant holding No. 50 on their Dalston estate in Cumberland for the period or periods specified in cl. 1 of it. By cl. 2 either party might terminate the agreement at any time by three months' notice to quit in writing. On August 23, 1943, the association served on the defendant a notice to quit on November 30, 1943, which was in writing. The defendant not having complied with this notice, the association sued him in the Carlisle county court. By the particulars of their claim, dated January 5, 1944, they claimed possession of the demised premises and mesne profits. The material part of the defence, dated January 18, 1944, was the reliance by the defendant on s. 25 of the Agricultural Holdings Act, 1923, and an allegation that the demised premises were an agricultural holding within the meaning of that Act. Section 25, sub.-s. 1, of that Act provides: " Notwithstanding any provision in a contract of " tenancy to the contrary, a notice to quit a holding shall be " invalid if it purports to terminate the tenancy before the " expiration of twelve months from the end of the then current " year of tenancy." Under s. 57, sub-s. 1: " contract of " tenancy " is defined as meaning " a letting of or agreement for " letting land for a term of years or for lives, or for lives and

" years, or from year to year." The agreement sued on was certainly a letting of land. The only question in the case was whether it was a letting " for a term of years " or " from " year to year." The judge held that it was not, and gave judgment for the plaintiffs. The defendant appeals.

It was contended for the defendant that " the tenancy " period " specified in cl. 1 of the agreement constituted this a letting " for a term of years." Reliance for that proposition was chiefly rested on a passage in Blackstone's Commentaries, which has been read by my brother Scott. I might only add to that that his citation was taken from my copy of the 6th edition, which was published in 1774, and, as Blackstone died in 1780, those are his own words. This passage is typical of the method of Blackstone in specifying exhaustive categories. In effect, he says that any estate less than freehold and not a tenancy at will or a tenancy on sufferance must be a tenancy for years. That means that a tenancy for any fixed time—a week, a month, a year, or longer—must be a tenancy for years since the law knows no period of time other than a year. In my view, the phrase " a term of years " in s. 57, sub-s. 1, of the Act of 1923 has no reference to the categories of " estates less " than freehold " thus analysed by Blackstone. It refers to a tenancy which, by the terms of its description in the lease or agreement for tenancy itself is found to be by those terms a letting for a term of years. On cl. 1 of the agreement of October 20, 1939, I think this cannot be so found. It is a letting for successive periods of 364 days, and not for a term of years. It is manifest from these words, as well as from the recital to which I referred, that the whole object of the draughtsman was to prevent the application of the Act of 1923. There is nothing illegal, immoral, or indecent in such an aim. The only question is whether the aim has been successfully achieved. I think it has, and that, as a result, this appeal should be dismissed.

LUXMOORE L.J. The main question arising on this appeal is whether the defendant was at the material date the tenant of a holding within the meaning of the Agricultural Holdings Act, 1923. If the answer is in the affirmative, then it is admitted that the county court judge was in error in ordering him to give up possession of the property let to him and to pay to the association mesne profits. There is a second question which has nothing to do with the Agricultural Holdings Act, 1923: Was the notice given to the tenant valid under the terms of the tenancy agreement? A third question was raised in the proceedings and in the notice of appeal, whether the Rent Restrictions Acts applied, but Mr. Lamb, who appeared for the defendant, rightly abandoned this point.

[His Lordship stated the facts and read the material sections, and continued :] The first question is whether the agreement constitutes a contract of tenancy within the Agricultural Holdings Act, 1923. A careful consideration of the agreement leaves no doubt in my mind that the association in drafting it had in view the total exclusion of the provisions and operation of the Agricultural Holdings Act, 1923. Have they succeeded in so doing? The Act does not apply to every tenancy of agricultural land. Its extent is governed by the definitions contained in s. 57 of the Act. Those material to be considered in the present case are " holding," " contract of tenancy " and " tenant." " Holding " is defined as meaning—with an exception not material to be stated—" any parcel of land held " by a tenant, which is either wholly agricultural or wholly " pastoral, or in part agricultural and as to the residue pastoral, " or in whole or in part cultivated as a market garden, and which " is not let to the tenant during his continuance in any office, " appointment, or employment held under the landlord." Apart from the special meaning given by the definition of " tenant," there could be no doubt but that the plot 50 on the Dalston Estate was a holding within the definition. " Tenant " is defined as meaning " the holder of land under a contract of " tenancy " and a " contract of tenancy " is defined as meaning " a letting of or agreement for letting land for a term of years, " or for lives, or for lives and years, or from year to year."

Obviously, to fall within the definition " contract of " tenancy " the agreement must either provide for the letting of the holding for a term of years or from year to year because, admittedly, no question of a letting for lives can arise. Mr. Lamb's first argument was to call in aid the provisions of s. 1, sub-s. 1, of the Law of Property Act, 1925, which states that " The only estates in land which are capable of subsisting " or of being conveyed or created at law are (*a*) an estate in fee " simple absolute in possession and (*b*) a term of years " absolute." He then turned to the definition of " term of " years absolute " in s. 205, sub-s. 1 (XXVII.) in the last mentioned Act which, so far as material, provides that " the " expression ' term of years ' includes a term for less than a year, "or for a year or years and a fraction of a year or from year to "year." He claimed to read this definition into the earlier Act, and argued that, even if the tenancy created by the agreement of October 20, 1939, would not have constituted a contract of tenancy within the definition already quoted it was brought within it by the application of the definition of "term "of years absolute" in the Law of Property Act, 1925. There is no warrant for this argument. The Agricultural Holdings Act, 1923, contains definitions applicable to the construction of that Act and those definitions cannot be altered or extended by any definition contained in some subsequent Act unless there is an express enactment to that effect.

Mr. Lamb next argued that under the definition of "contract "of tenancy" in the Agricultural Holdings Act, 1923, the tenancy created by the agreement of October 20, 1939, was either for a term of years or from year to year. In support of his contention that the tenancy was for a term of years he quoted a passage from Blackstone's Commentaries (21st ed., vol. II., p. 140) which reads: "An estate for years is a contract "for the possession of lands or tenements, for some determinate "period; and it takes place where a man letteth them to "another for the term of a certain number of years, agreed "upon between the lessor and the lessee, and the lessee enters "thereon. If the lease be put for half a year or a quarter, or "any less time, this lessee is respected as a tenant for years, "and is stiled so in some legal proceedings: a year being the "shortest term which the law in this case takes notice of." The authority quoted by the learned author in support of this statement is Littleton, s. 67. Now, it is to be observed that the learned author says, not that a lease for part of a year is in law a lease for years, but that the tenant of such a lease is respected (that is, treated) as a tenant for years, and this is made abundantly clear if the authority quoted in support of the statement is considered. Littleton, s. 67, is as follows: "Also, if "tenements be let to a man for terms of halfe a yeare, or for a "quarter of a yeare, etc., in this case, if the lessee commit "waste, the lessor shall have a writ of waste against him, and "the writ shall say, quod tenet ad terminum annorum; but "he shall have an especiall declaration upon the truth of his "matter, and the count shall not abate the writ, because he "cannot have any other writ upon the matter." This shows that, if land was let for a part of year, the lessor was allowed to describe the tenant as holding for a term of years although he did not, in fact, so hold because no other form of writ was open to him. The passage from Blackstone is, therefore, no authority for the proposition that a tenancy for a part of a year is in law a tenancy for a term of years. Indeed, there is well worn authority against such proposition to be found in the *Bishop of Bath's Case* (1): " If a man leases his land for years, it is a " good lease for two years, because it shall be taken good for " such a number with which at least the plural number will " be satisfied, and that is with two years." Here the term is for a period of time which is, in fact, 364 days and not a year. It is described by reference to the first and last day of the period, namely, October 1, 1939, to September 29, 1940. The habendum in the agreement continues "and thenceforward " from September 30, 1940, for the term of 364 days and " thereafter for successive periods of 364 days." This is a tenancy for two periods of 364 days certain and not for two years certain, and, therefore, cannot be described as for a term of years.

Mr. Lamb next contended that the tenancy created by the agreement was from year to year. I can find no warrant for such an argument. The tenancy is from one period to another period, but the period is not a year, and it is, I think, impossible to describe it as being from year to year. In arguing this point, Mr. Lamb called attention to references in the agreement to such phrases as " the last year of the tenancy," " every " three years," " every second year." In my judgment, these phrases are not sufficient to displace the plain words used in the habendum or entitle the court to read them in some other way than in their ordinary and natural sense. There seems to be strong indication in the Agricultural Holdings Act, 1923, that the Act is only directed to tenancies for years or from year to year and larger estates (for example, leases for lives), for in s. 25, sub-s. 1, the reference is to the " then current year of " tenancy." Obviously, if the tenancy is for periods less than a year, it would be impossible to give a notice to terminate it at the end of the then current year because there is no such period fixed by or ascertainable under the agreement. In my judgment, the learned judge was right in holding as he did that the tenancy created by the agreement of October 20, 1939, was not a contract of tenancy within the meaning of the definition in s. 57 of the Agricultural Holdings Act, 1923, and, consequently, was not affected by the provisions of s. 25.

(1) 6 Co. Rep. 36*a*.

C. A.
1944
LAND SETTLEMENT ASSN., LD. *v.* CARR.
Luxmoore L.J.

Mr. Lamb's last point was that the notice to quit was invalid because it was not directed to take effect at the end of one of the periods created by the agreement. The notice was given in pursuance of an express provision in the agreement which provides that the agreement "may be determined by either "party at any time during the currency of the term or any "successive period giving to the other three previous calendar "months notice to quit." It seems to me that the phrase "at any time" refers to the determination of the tenancy and not to the giving of the notice. Mr. Lamb's argument that the only valid notice that can, on the true construction of the clause, be given is one which expires at the end of one of the periods created by the agreement, seems to me to give no sensible meaning to the words "at any time," for there is no need to give the parties power to give notice at any time if, in fact, the only notice that can be effective is one which operates at the end of one of the periods created. For these reasons I agree this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for defendant: *Wainwright & Co., for Wannop & Co., Carlisle.*

Solicitors for plaintiffs: *Farrer & Co.*

P. B. D.

1944
May 10, 11,
Macnaghten J.

FITZGERALD *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Income tax—Sur-tax—Deduction—Deed—Provision for payment of stated amount free of income tax—Deed executed before September 3, 1939—*Variation after passing of Finance Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.

By s. 25, sub-s. 1, of the Finance Act, 1941, any provision in a deed or other instrument, however worded, for the payment of a stated amount free of income tax, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10*s.* in the pound, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof. This, by paras. (*b*) and (*c*) only applies if the provision has been made before September 3, 1939, and has not been "varied on or after that date."

On a date after September 3, 1939, and also after the passing of the Act of 1941, the appellant varied a deed made before September 3, 1939 :—

Held, that "has not been varied . . . . after that date" meant a date between September 3 and the passing of the Act, and that, therefore, the variation by the appellant was not a variation within para. (*c*) and did not take the deed outside the application of the section.

CASE stated by Special Commissioners of Income Tax.

At a meeting of the commissioners on April 12, 1943, the appellant, Major Sir J. P. G. M. Fitzgerald appealed against an assessment to sur-tax for the year 1941–1942 in the sum of 25,882*l.* The sole question at issue was whether, in computing the appellant's liability to sur-tax, the deduction allowable in respect of certain payments made under two deeds dated March 30, 1939 ("the principal deed") and March 21, 1942 ("the supplemental deed") was 4,200*l.* or 2,897*l.*, the lesser sum being twenty twenty-ninths of the larger sum. By the principal deed the appellant, in consideration of his love and affection for his step-daughter, Jean, Lady Brougham & Vaux, covenanted to pay her, as from March 31, 1938, until his or her death, such a monthly sum as, after deduction of income tax at the prevailing standard rate, should amount to £175. The appellant reserved the right at any time after the expiration of seven years from March 30, 1939, by deed or deeds revocable or irrevocable with certain consents to revoke the deed and covenant in whole or in part. The standard rate of income tax for 1941–1942 was 10*s.* in the pound. On July 22, 1941, the Finance Act, 1941, became law, including s. 25, sub-s. (1), by the effect of which there was substituted for the monthly sum of 175*l* mentioned only twenty twenty-ninths thereof, i.e., 120*l.* per month. Consequent on the passing of this section, the appellant, on March 31, 1942, entered into the supplemental deed. He therein recited that, at the date of the principal deed and ever since, it had been his intention that the covenant

(1) By Finance Act, 1941, s. 25: "(1.) Subject to the provisions of "this section, any provision, how- "ever worded, for the payment, "whether periodically or "otherwise, of a stated amount "free of income tax . . . . being "a provision which . . . . (*b*) was "made before September 3, 1939; "and (*c*) has not been varied on "or after that date, shall, as "respects payments falling to be "made during any year of assess- "ment, the standard rate of "income tax for which is ten "shillings in the pound, have "effect as if for the stated amount "there were substituted an "amount equal to twenty twenty- "ninths thereof."

in the principal deed should have effect according to its terms whatever the rate of income tax prevailing from time to time might be and that he desired to vary its provisions to give effect to such intention. He, therefore, declared that the covenant should operate and have effect as if s. 25, sub-s. 1, had never become law to the intent that the net monthly sum of 175*l.* might be deemed to have become payable on the due dates passed and might thereafter be paid whatever the standard rate of income tax might be. In fact, the appellant had always paid the 175*l.*

It was contended for the appellant that the supplemental deed did not operate to make a further and new sum payable, but merely restored the position under the principal deed, and that, consequently, the nine twenty-ninths which, if the supplemental deed had not been executed, would, by s. 25, sub-s. 1, of the Act of 1941, have been disallowed as a deduction should be allowed as a deduction. The words " has not been varied on " or after that date," namely September 3, 1939, included a variation made after the passing of the Act, namely the variation made by the supplemental agreement on March 21, 1942. It was contended for the commissioners that, as the variation was made after the passing of the Act, s. 25, sub-s. 1 continued to apply and only the reduced payment payable thereunder should be allowed; that, in any event, the supplemental deed operated to make an additional sum of 55*l.* payable by the appellant for the remainder of the term; and that, the power of revocation becoming exercisable within less than six years from the date when the first of such payments became payable, the sum of 55*l.* was caught by the provisions of s. 38, sub-s. 1, of the Finance Act, 1938, and must be deemed to be the income of the appellant; and that the deduction for sur-tax purposes should be restricted to twenty twenty-ninths of 4,200*l.*, i.e., 2,897*l.* The commissioners dismissed the appeal but stated this case.

King K.C. and *N. C. Armitage* for the appellant.
Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown.

MACNAGHTEN J. [after stating the facts]: The question at issue is whether, in computing the appellant's liability to surtax for 1941–42, the twelve monthly payments of 175*l.*, amounting to 2,100*l.*, or only twenty twenty-ninths of that amount should be regarded as the amount of the annuity payable under the deed of covenant, dated March 30, 1939. In the one case the appellant would be entitled to deduct 4,200*l.* as a charge on his income. In the other case he could only deduct twenty twenty-ninths of that sum, namely, 2,897*l.* He cannot claim any deduction in respect of money paid under the supplemental deed because he has power to revoke that covenant within six years. Therefore, he must contend that the original covenant is not affected by the provisions of s. 25, sub-s. 1, of the Finance Act, 1941. Mr. King, for the appellant has urged that the words in s. 25, sub-s. 1, "has not been varied on or after "that date" should be read as including a variation made after the passing of the Act, and that, therefore, the original covenant is not affected by the section. I regret that I cannot so read these words. I think that the words "has not been "varied on or after that date" refer to a variation made after September 3, 1939, and before the date of the passing of the Act. That is, I think, the natural and obvious meaning of the words. It is a hard case because, if Parliament had realized that a covenantor might wish to bear the hardship caused by the high rate of the tax rather than put the hardship on his beneficiary, it seems probable that he would have been allowed to do so, but under the provisions the appellant has no option in the matter. Willy nilly the covenanted sum is reduced to twenty twenty-ninths. Therefore, the appeal must fail.

Appeal dismissed.

Solicitors for appellant: *Guscotte, Fowler & Cox.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. L. L. B.

WOODWARD *v.* HASTINGS CORPORATION AND OTHERS.

1944
May 1, 2.
Hallett J.

Limitation of actions—Public authorities protection—School—Endowed secondary school—Action by infant against governors—Neglect in execution of public duty—Application of limitation against infant in custody of parent—Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *ss.* 21, 22 (*d*).

The governors of an endowed secondary school, being an endowed school within the Endowed Schools Acts, 1869 to 1889, are a public

1944

WOODWARD
v.
HASTINGS
CORPORATION

authority and, as such, entitled to the benefit of the provisions of the Limitation Act, 1939, limiting the period within which legal proceedings against them must be commenced.

ACTION tried by Hallett J.

The plaintiff, Cecil Douglas Woodward, an infant of twelve years of age, brought this action by his mother, as next friend, to recover damages for personal injuries sustained by him through the negligence of the two defendants as representing the governors of Hastings Grammar School. In July, 1940, owing to the war, the school was removed from Hastings to St. Albans, and was accommodated in the Abbey Institute and the Congregational Church School, in Spicer Street. On the morning of January 14, 1942, it had been snowing. The plaintiff while on his way from the Church School to fetch boys from the Abbey Institute to attend at the Church School, on which mission he had been sent by the geography mistress, slipped on a step which the snow had rendered dangerous, fell, and sustained injuries. The employee whose duty it was to sweep the step, was in the employ, not of the defendants, but of the Congregational Church authorities, and the arrangement between the defendants and those authorities included the cleaning of the premises. The plaintiff lived at home with his mother, his father serving as a writer in the Royal Navy and coming home from time to time on leave.

Hastings Grammar School was managed under the terms of a scheme sealed by the Board of Education on April 13, 1910, and was an endowed school within the meaning of the Endowed Schools Acts, 1869 to 1889. Hallett J. said it was an endowed secondary school. By s. 45 of the Endowed Schools Act, 1869, a scheme as approved by Her Majesty in Council is to have effect as if enacted in that Act, and, therefore, the duties and powers of making schemes under the Charitable Trusts Act or otherwise are transferred to the Board of Education. Under the scheme of the school No. 9 of the management rules provides that "The governors shall keep in repair all the buildings of the "foundation not required to be kept in repair and insured by "the lessees or tenants thereof." Hallett J. held that the duty of providing suitable premises fell on the defendants, and that that duty was not altered in point of law by the transference of the school to St. Albans.

The accident happened on January 14, 1942, and the writ was not issued until May 21, 1943. Therefore, if s. 21 of the

Limitation Act, 1939, applied (1), the action was barred by lapse of time. The plaintiff contended that it did not apply by reason of s. 22 thereof (1).

Eddy K.C. and *S. Lincoln* for the plaintiff. The defendants were guilty of a breach of their obligation to provide proper premises for the scholars, and the standard of care demanded of them is the same as in the case of a schoolmaster. The fact that these were temporary premises can make no difference. By their employee (for this purpose) the defendants were guilty of negligence in not sweeping the snow from the step, which, in fact, constituted a trap. The defendants are not a public authority within the meaning of the Act, and even if they were, the limitation of one year imposed by s. 21 does not apply, as the plaintiff has proved, within the meaning of s. 22 (*d*) that he was not, at the time the right of action accrued, in the custody of his father who was normally absent from the home, serving in the Navy.

Dare for the defendants. The defendants are a public authority constituted by a scheme which has the effect of an Act of Parliament. Section 21, sub-s. 1, of the Limitation Act, 1939, applies notwithstanding s. 22 (*d*), for the father was still an inhabitant of his home, although absent for long periods, and in control of it while at home, and the plaintiff was in his custody. The sub-section speaks, not of a father, but of a parent, and the plaintiff was, at any rate, obviously in the custody of his mother.

HALLETT J. [having stated the facts]: In the first place, I think that I ought to make up my mind what is the duty of those who are required or undertake to provide premises for use by the scholars of a school. Certain authorities have been cited to me. I need not review them all, but perhaps I should mention *Ching* v. *Surrey County Council* (1), and *Morris* v. *Carnarvon County Council* (2). I have no doubt that the duty of such persons is to make the premises as safe for use by the scholars in the ordinary way in which scholars may be expected to use them as reasonable care and skill can make them, and for the purposes of this case I hold that to be the duty of the persons who are required or who undertake to provide the premises for a school.

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(1) Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 21: "(1.) No "action shall be brought against "any person for any act done in pursuance, or execution, or intended "execution of . . . . any public "duty or authority, or in respect "of any neglect or default in the "execution of any such . . . . "duty or authority, unless it is "commenced before the expiration of one year from the date "on which the cause of action "accrued."

Section 22 extends the period of one year to six years where the person to whom the right of action accrued was under a disability, but provides "(*d*) this section, "so far as it relates to the disability of infancy . . . . shall "not apply to any action to which "the last foregoing section applies, "unless the plaintiff proves that "the person under a disability "was not, at the time when the "right of action accrued to him, "in the custody of a parent."

The next question is: Were the governors, who are sued in the present action, persons who were required or had undertaken to provide premises for this school? The burden of showing that, in my view, was on the plaintiffs and the plaintiffs' investigation into the legal position of the governors appears to have been at least superficial. Hastings Grammar School is managed under the terms of a scheme sealed by the Board of Education on April 13, 1910. I think that it may be described as an endowed secondary school, and there would seem to be no doubt that it is an endowed school within the meaning of the Endowed Schools Acts, 1869 to 1889. By s. 45 of the Endowed Schools Act, 1869, a scheme, when and as approved by Her Majesty in Council, is to have full operation and effect in the same manner as if it had been enacted in that Act, and the duties and power of making schemes which the Charity Commissioners might otherwise enjoy under the Charitable Trusts Act or otherwise, are transferred to the Board of Education. Under this scheme there are certain management rules, and No. 9 of the management rules provides that "The governors shall keep in repair all the "buildings of the foundation not required to be kept in repair "and insured by the lessees or tenants thereof." I think that the position is certainly very much less clear than it was in *Griffiths* v. *Smith* (3), where it would seem to have been beyond doubt that the duty of providing a school-house and keeping it in good repair was imposed by express enactment on the managers of the non-provided public elementary school which was there in question. However, while recognizing that the materials are less certain, I am satisfied that in this case the duty of providing suitable premises fell on the governors of the school.

(1) [1910] 1 K. B. 736.
(2) Ibid. 840.
(3) [1941] A. C. 170.

The next question is: Was that duty in any way affected by the removal from Hastings to St. Albans? The facts with regard to the removal are a little obscure, although the broad outline of what happened is clear. In July, 1940, there was somebody who was minded to imitate the achievements of William the Conqueror, and, therefore, advice was given to school authorities on the south coast to remove their schools elsewhere. Hastings Grammar School were told to go to St. Albans and arrangements to enable them to go there were made for them. Premises were acquired for them by the Hertfordshire Education Committee. The headmaster told me in evidence that he did not think that there was any rent paid, and, apparently, the arrangement included the provision of cleaning. I do not think that the duty of the governors of the Hastings Grammar School can have been altered in point of law by this transference of the school from Hastings to St. Albans.

The next question is: If the defendants were under a duty to see that these premises were as safe as reasonable care and skill could make them, were they guilty, on January 14, 1942, of a breach of that duty? [His Lordship described the condition of the step.] A Mrs. Clark, whose duty it was as caretaker to clean and so forth in connexion with the school, was employed by the Congregational Church authorities, but, on the view I take of this case, that makes no difference. That she regarded the step as dangerous appears to be certain, because she says that her intention was to cast some ashes on it before she left. Unfortunately, in the interval between clearing the step and putting ashes on it the infant plaintiff had sustained the fall which caused his injury. To my mind, this step was not as safe for the scholars of the school as reasonable care and skill could have made it at the material time.

In my opinion, the governors continued to be responsible for the state of the premises, and, therefore, this action would succeed but for the defence, which rests on s. 21 of the Limitation Act, 1939, which has replaced the well-known provision in s. 1 of the Public Authorities Protection Act, 1893. Mr. Dare has to establish that this action was brought against the governors of Hastings Grammar School in respect of some neglect or default in the execution by them of a public duty or authority, and, therefore, he has to satisfy me that in carrying on this grammar school the governors were executing a public duty or authority. Mr. Eddy, for the plaintiff, tries to meet the defence, first, by denying that the governors are executing a public duty or authority and, secondly, by relying on s. 22 of the Limitation Act, 1939.

It may be convenient if I deal first with s. 22. The infant plaintiff lived at home with his mother in Clapton when he was not at school. His father was serving as a writer in the Royal Navy, but was coming home from time to time on leave. He knew about the accident very soon after it happened, and counsel has failed to satisfy me that the infant plaintiff was not in the custody of his father. I think that he was in the custody of his father, although the care of his father, if one wants to draw a distinction, was limited to such care as the father could give on leave and by postal and similar communication. Even if I were satisfied that the infant plaintiff were not in the custody of his father, he has certainly failed to satisfy me that he was not in the custody of his mother. It seems to me plain that he was in the custody of his father or mother, or, in other words, that he was in the custody of a parent. Indeed, in May, 1943, the mother brings this action as next friend.

It was pointed out a long time ago that it is far from easy to define satisfactorily a public authority for the purpose of the then provision in the Public Authorities Protection Act, 1893. I think that it is also far from easy to define a public duty or authority for the purpose of s. 21 of the Limitation Act, 1939, and I do not intend to attempt to do that which others much more eminent have found difficult or impossible to do, but I derive some assistance from authorities either cited to me or found by me. In the first place, it is clear that it is not every authority which carries on its undertaking under statutory sanction that can avail itself of this protection. In particular, it is clear, I think, that any authority is excluded from that protection which carries on its undertaking for commercial gain. There are authorities to that effect, and the view is, perhaps, confirmed by the definition of " public authority " contained in s. 12, sub-s. 2, of the Acquisition of Land (Assessment of Compensation) Act, 1919. In the second place, I think that it is clear that the mere fact that the undertaking is of a laudable nature and in the public interest is not sufficient to make the body which carries it on a public authority. That, I think, appears from the Scottish case which has been cited to me: *Ayr* v. *St. Andrew's Ambulance Association* (1). On the other hand, it would be hopeless nowadays to contend that the protection is only afforded to those authorities which are in the position of national or municipal authorities. A discussion on the matter will be found in *The Johannesburg* (1). I have been referred to *Greenwood* v. *Atherton* (2), and, as I have already said, *Griffiths* v. *Smith* (3). Those are the two cases from which I derive the most assistance, although in those cases the courts were concerned with the managers of public elementary schools, whereas in the present case I am concerned with the governors of an endowed secondary school. Therefore, those cases are not directly in point, but, having regard to all the circumstances, I feel that the language of Goddard L.J. in *Greenwood* v. *Atherton* (2) would be equally applicable to the present case.

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(1) 1918 S. C. 158.

The governing body of this foundation is by the scheme to consist of fourteen persons. Two of them are ex-officio, namely, the mayor of Hastings and the chairman of the education committee of the council of the county borough. Nine of them are to be representatives—six appointed by the council of the county borough, one by the vestry of the parish of All Saints, one by the vestry of the parish of St. Clements, and one by the .council of the senate of the University of Cambridge—so that, out of the eleven governors whom I have mentioned so far, the only one who was not appointed by an unquestionable public authority is that appointed by the senate of the University of Cambridge. Then there are to be three to be co-opted by resolution of the governors. There are twenty foundation scholars, who enjoy a total exemption from payment of tuition fees. The other boys are paid for, 5*l*. 10*s*. a term, which includes the use of stationery. That 5*l*. 10*s*. is paid to the school, and, whether it is paid by the parents or whether it is paid by some assisted authority (in the case of this particular plaintiff, the London County Council, one of whose scholarships was held by the plaintiff) does not affect the school authorities and does not affect my mind in any way, but when what can be obtained from fees has been obtained and when what can be obtained from endowments has been applied to the sanctioned purposes, which, as one would expect, are partly scholarships, the deficiency if any (and with fees of only 5*l*. 10*s*. a term one can well contemplate that there will be deficiencies), is met, in the first instance, out of the rates of the local authority at Hastings, although the headmaster tells me that to the best of his belief fifty per cent. of that deficiency is passed on by the local authority

(1) [1907] P. 65.
(2) [1939] 1 K. B. 388, 392.
(3) [1941] A. C. 170.

at Hastings to the central authority in Whitehall and so comes out of taxes. In other words, any deficiency in the sum required to pay for the school is borne half by the rates and half by the taxes.

I return to Goddard L.J.'s judgment in *Greenwood* v. *Atherton* (1). There are only a few sentences and I should like to borrow them. "These foundation managers," he says, "are acting in pursuance of a public duty." I ask myself: Does not that apply perfectly to these managers? I see no reason why I should except the one appointed by the council of the senate of the University of Cambridge. Are not those persons acting in pursuance of a public duty? If not, what are they doing? It seems to me that it would be wrong to say that they were merely acting in pursuance of a charitable instinct and a desire to serve the community. Goddard L.J. goes on: "It seems to me really quite unarguable to say "that they are not a public authority and not acting in "pursuance of a statutory duty, and although it may be they "could not be compelled to keep the school in existence, so "long as they are in receipt of a grant from public funds I do "not see how it can be said they are not public authorities." I recognize that the lord justice was dealing with a different kind of school and I do not cite the words as authority, but I cite them as expressing what I myself feel about this case. I feel that, looking at all the facts and circumstances, it is impossible for me to say that these governors, in performing their functions of managing this grammar school, are not performing a public duty or exercising a public authority. I think that they are, and, therefore, I think that the neglect or default in respect of which they are sued is a neglect or default in the execution of a public duty or authority, namely, the public duty or authority of conducting this grammar school and providing it with suitable premises in which its work can be carried on.

For these reasons I have come to the conclusion that the defence based on the Limitation Act must succeed, and there must be judgment accordingly.

Judgment for defendants.

Solicitor for plaintiff: *F. Bernard Smith.*
Solicitors for defendants: *Gardiner & Co.*

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(1) [1939] 1 K. B. 388, 392.

W. L. L. B.

VICKERY *v.* MARTIN.

C. A.

1944

July 5.

Lord Greene M.R., MacKinnon and Luxmoore L.JJ.

Landlord and tenant—Rent restriction—Application of Acts—Part of dwelling-house used for business purposes—Guest house—Resident proprietress—Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 3.

The plaintiff was the tenant from the defendant of a dwelling-house to which the Rent and Mortgage Interest Restrictions Act, 1939, applied at a rent of 80*l.* a year. She used the premises for the purposes of a guest-house, reserving for her own use at least three rooms, but at times she changed these rooms to suit her bookings of guests. In an action by her against the landlord claiming the return of two years' difference between the contractual rent of 80*l.* and the standard rent which was 35*l.* :—

Held, that the premises were the plaintiff's dwelling-house, and that s. 3, sub-s. 3, of the Act of 1939 (which re-enacts s. 12, sub-s. 2 (ii.) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, prevented the partial use of the premises for business purposes taking them out of the Act, for those sub-sections are not to be read as though the words " a non-substantial " were inserted before " part of the premises."

APPEAL from Haywards Heath county court.

In 1919 a dwelling-house known as " Deans " at Haywards Heath was let at an annual rent of 35*l.* Thereafter it was not let, but remained in the occupation of the owner or vacant till the outbreak of war in 1939. By a tenancy agreement, dated May 30, 1940, the landlord, Mrs. Martin, let " Deans " for three years to one, Mrs. Manners, at a yearly rent of 80*l.* The agreement contained a covenant by the tenant " not to " exercise or carry on or permit or suffer to be exercised or " carried on at any time during the said term in or upon the " said premises or any part thereof any trade or business or " profession but will (*sic*) use the same as a private dwelling-" house only." Notwithstanding this covenant, it was common ground that both parties knew that Mrs. Manners intended to use the house as a guest house, to be carried on by her in partnership with the present tenant, Mrs. Vickery. On July 30, 1940, the tenancy was assigned to the present tenant who bought out Mrs. Manners, and thereafter conducted the business of a guest house on the premises by herself. The tenant herself resided on the premises, reserving for her use at least a living-room and two bedrooms, but at times she changed these rooms to suit her bookings of guests. It was admitted that the rateable value of the house at all material times was such as to bring it within the Rent and Mortgage Interest Restrictions Act, 1939. On January 21, 1944, the tenant issued a summons in the county court claiming repayment of 90*l.*, being the difference between the rent for two years at 80*l.* per annum and at the standard rent of 35*l.* The landlord denied that the tenant was entitled to the protection of the Acts on the ground that she was using the premises as business premises and was carrying on there the business of a guest house. The county court judge gave judgment for the landlord, and the tenant appealed.

Mitchison for the tenant. Section 3, sub-s. 3, of the Act of 1939 (1) corresponds almost exactly with s. 12, sub-s. 2 (ii.), of the Act of 1920. The test is whether the tenant resides and is entitled to reside on the premises. *Epsom Grand Stand Association* v. *Clarke* (2) was given statutory effect by s. 12, sub-s. 2 (ii.), of the Act of 1920. The county court judge appears to have based his decision on an observation of Shearman J. in *Colls* v. *Parnham* (3) where he referred to a " substantial " user for residential purposes, but the Court of Appeal subsequently in *Hicks* v. *Snook* (4) applied no such test. It is unfortunate that *Hicks* v. *Snook* (4) was not cited in the county court. Here the tenant resided on the premises, which were her dwelling-house, and the fact that she made her living by letting part of them is not sufficient to deprive her of protection.

Raeburn for the landlord. The distinction between this case and others is that the business of letting rooms necessarily involves dwelling. There is no boarding-house which is not a dwelling-house in the popular sense, but if, in truth, the user of the premises is a business user, the fact that the nature of the business involves dwelling on the premises does not make the premises a dwelling-house within the meaning of the Acts. In other words, this is not a case of part of the premises being used for business purposes, but of the whole premises being so used. If the proprietress of a hotel acts as her own manageress it may be said that her residence is merely ancillary to her business and the premises will not be a dwelling-house. So, also, if a house which has been used as a dwelling-house down to a certain date is then used for the purposes of a business which in its nature involves dwelling, the Acts, it is submitted, cease to apply. Section 3, sub-s. 3, of the Act of 1939 and s. 12, sub-s. 2 (ii.), of the Act of 1920 are not intended to extend the protection of the Acts to premises where the business use is substantial and the dwelling, if any, merely ancillary thereto. [He referred to *Thorn* v. *Madden* (1) and *Barrett* v. *Hardy Bros.* (*Alnwick*), *Ld.* (2).]

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(1) By s. 3, sub-s. 3, of the Rent and Mortgage Interest Restrictions Act, 1939 (which re-enacts with regard to houses within that Act the provisions of s. 12, sub-s. 2, proviso (ii.), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920) : " The application of the principal Acts, " by virtue of this section, to any " dwelling-house shall not be " excluded by reason only that " part of the premises is used as " a shop or office or for business, " trade or professional purposes."

(2) [1919] W. N. 170 ; 35 T. L. R. 525.

(3) [1922] 1 K. B. 325.

(4) (1928) 93 J. P. 55.

LORD GREENE M.R. [after stating the facts]: The tenant was living in this house subject from time to time to the right of her guests to the use and occupation of such parts of the house as she chose to let them occupy. Subject to that, the house was hers. It was there that she lived, and she took it for the purpose of living there and carrying on this business, if it is so to be called, of taking in guests or lodgers. The county court judge found that the parties intended that the house should be used as a boarding house. That certainly does not bring the landlord home, or anywhere near home, because the user as a boarding house is not inconsistent with the house being a dwelling-house within the meaning of the Rent Restrictions Acts. He then found that the house was taken by Mrs. Manners, the first lessee, solely for use as a lodging or guest house. If that means that she did not take it also as a dwelling-house for herself, it seems to me that it is not supported by any evidence. The judge also found that the tenant was "on business premises managing the "business and her living there was entirely ancillary to "carrying on the business." I do not follow what that means, because if a person takes in lodgers to supplement her income and enable her to keep up her house, it might equally well be said that the taking in of the lodgers was ancillary to her occupation of the house as a dwelling-house. It seems to me that that finding not only does not carry the matter any further, but that it paves the way for the application of a test which is not the right test.

The question arises whether on those facts the tenant was entitled to the protection of the Act. The house is what is called a "1939 house" and the relevant enactment is s. 3, sub-s. 3, of the Act of 1939, which repeats in practically the same words, s. 12, sub-s. 2 (ii.), of the Act of 1920. The expression used in the former Act is "dwelling-house" and that in the latter Act is "house," but that does not make any difference, because we find in s. 16 of the Act of 1939 that "dwelling-house" in that Act has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling-house or part of a house being so let. Therefore, "dwelling-house" here means a house let as a separate dwelling.

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(1) [1925] Ch. 847.
(2) [1925] 2 K. B. 220, 226.

I would like to say a word about the history of s. 12, sub-s. 2 (ii.), of the Act of 1920. It first appeared in this legislation in that Act. In 1919 a case was decided in this court, which, in effect, shows that the law before that subsection was enacted was the same as it was afterwards. That was *Epsom Grand Stand Association, Ld.* v. *Clark* (1). The question arose whether a hotel in which the defendants lived while running their hotel business was protected by the Act. Bankes L.J., delivering the leading judgment, said: "Then "is this hotel a dwelling-house? The Act contains no "definition of a dwelling-house. The only conditions are that "the premises must be a house or part of a house and let as "a separate dwelling. If they fulfil these conditions and others "relating to value then they are to be deemed to be a dwelling-"house to which the Act applies." He refers to the defendants' residence on the premises and to the fact that the premises were let for occupation, and he held: "It is in the fullest "sense a dwelling-house, and none the less so because it is "also a public-house." In *Hicks* v. *Snook* (2), Scrutton L.J. referred to that authority and to s. 12, sub-s. 2 (ii.), of the Act of 1920. He said: "In that case the Court of Appeal "held that as he [the tenant] was dwelling in the house and "had a right to dwell in the house, the house was a dwelling-"house, and the fact that besides being a dwelling-house "part of it was used for business premises did not prevent it "being a dwelling house to which the Act applied." After quoting the proviso in the Act of 1920, he went on: "That "proviso appears to me to affirm in statutory form what the "Court of Appeal had decided."

That is the history of this provision. It is to be noted that, after that pronouncement in the Court of Appeal in 1928, this phraseology reappears unaltered in the Act of 1939. It must be taken, therefore, that the legislature is satisfied with that language as construed and considered by this court as being sufficient to express its intention.

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(1) [1919] W. N. 170, 171.

(2) 93 J. P. 55, 56.

The words of s. 3, sub-s. 3, say that, once a house is a dwelling-house within the meaning of the Act, it is not sufficient to exclude it from the operation of the Act merely to show that part of the premises is used as a shop or office or for business, trade or professional purposes. The first question, therefore, in relation to any particular premises is: Are these premises a dwelling-house within the meaning of the Act? If they are, it is no use the landlord coming and saying that part of the premises is used for business purposes because that is the very thing which the sub-section says is not sufficient to exclude them. If he wishes to exclude them, he has got to show something more. As I have said, this house is unquestionably a dwelling-house. It is a house in which the tenant lives. She has the exclusive use of part of it. It is her home. Her husband and children live there when they are able to do so, and it is the tenant's exclusively subject to the licences which she may grant to such persons as come as lodgers or guests in the house. Subject to that, it is her home, her dwelling-house, and the fact that she puts herself from time to time to a certain amount of inconvenience does not alter the fact that it is her home. If the judge's judgment is to be read as finding that this is not a dwelling-house, then, in my opinion, there was no justification on the evidence for so holding.

The house being a dwelling-house, what is alleged as being sufficient to exclude it from the Act? It is the very thing which the sub-section says is not sufficient, namely, that part of it, to wit, such part as from time to time is used to accommodate guests or lodgers, is used for those business purposes. Mr. Raeburn says that s. 3, sub-s. 3, of the Act of 1939 cannot be read literally, but that something must be read into it. He contends that it must be construed as if it read: "shall not be excluded by reason only that *a non-*"*substantial* part of the premises is used as a shop or office "or for business, trade or professional purposes." His argument is that in the present case the substantial user of these premises was for business purposes and that such use as this is excluded from the Act. I can find no justification for reading anything into this part of the sub-section. It was enacted when the legislature had before it the decision of this court in *Epsom Grand Stand Association* v. *Clarke* (1.) The legislature repeated precisely the same language when it had before it the decision of this court in *Hicks* v. *Snook* (2). It is unthinkable that the legislature can have intended that such a word as "non-substantial" should be read into the sub-section by judicial interpretation. I can see no reason for doing such violence to the language.

The county court judge, in effect, took the view which Mr. Raeburn has put before us, because he directed his attention to the substantial use of these premises. I can sympathise with him as I always do sympathise with county court judges who are confronted with the task of trying to interpret these Acts of Parliament and particularly as he took the word "substantial" from the language of Shearman J. in *Colls* v. *Parnham* (3). That was six years before the decision in *Hicks* v. *Snook* (2), and Shearman J. in his judgment there, referring to the *Epsom Grand Stand* case (1) said: "But "*Epsom Grand Stand Association* v. *Clarke* (1) had previously "decided that where premises in one letting were partly "let for trading purposes, but there was a substantial letting "and user of them for residential purposes, they constituted "a dwelling-house within the Rent Restriction Act, 1915." With respect to that learned judge, he misapprehended, in my opinion, the meaning of the decision in the *Epsom Grand Stand* case (1). What that decision meant has been made perfectly clear by this court in *Hicks* v. *Snook* (2), and it is only fair to the county court judge to say that he did not have the latter decision before him. Nevertheless, I cannot take the word "substantial" in Shearman J.'s judgment as being a test for the purpose in which we are at present engaged. It seems to me, on the clear language of the sub-section and on the facts of this case, that the premises are undoubtedly a dwelling-house and that nothing is put forward as taking them out save the fact that part of the premises is used for business purposes. I decline, with the language of the sub-section before me, to embark on an inquiry what is the substantial use, or what, in the language of the county court judge, is the principal or the ancillary use, of these premises.

I may conveniently conclude by referring to some words in the judgment of Sankey L.J. in *Hicks* v. *Snook* (2), which

(1) [1919] W. N. 170.
(2) 93 J. P. 55, 56.
(3) [1922] 1 K. B. 325, 327.

appear to me to put the matter from a very useful angle. He said: " So far as this case is concerned, and on the facts of " this case, I prefer to put my judgment in the form of a " negative. It cannot be said that the house in question was " not let as a dwelling-house (see the lease);"—the same applies here—" it cannot be said that in this case the plaintiff had " not a right to dwell there . . . . and it cannot be said that " the plaintiff has not in fact dwelt there, or has not dwelt " there, because he has dwelt there for twenty-five years, " and is still dwelling there. I think we were told that there " were more rooms occupied in these premises for dwelling " purposes than were occupied as a shop. I do not, however, " rest my judgment upon that. I prefer to go on the admitted " facts of this case without saying what would happen if the " facts in some future case which may be brought up are " different." Every word of that appears to me to apply to the facts in the present case. The landlord has failed to show circumstances sufficient to exclude the house from the operation of the Act. The appeal must be allowed, and judgment entered for the tenant for 90*l.* and costs.

MacKinnon L.J.: I agree.

Luxmoore L.J.: I also agree.

Appeal allowed.

Solicitors for plaintiff: *Elvy Robb & Co.*
Solicitors for defendant: *Church, Adams, Tatham & Co., for Waugh, Brumell & Bally, Hayward's Heath.*

J. W. H.

ARABIAN *v.* TUFNALL AND TAYLOR, LIMITED.

1944
June 26, 27; July 5.
Wrottesley J.

Workmen's compensation—Alternative remedies—Estoppel by record—Claim for damages at common law—Previous acceptance of compensation by infant—Memorandum of agreement registered in county court—Workmen's Compensation Act, 1925 (15 *and* 16 *Geo.* 5, *c.* 84), *s.* 23, *s.* 25, *s.* 29, *sub-s.* 1.

An infant, who had received workmen's compensation from his employers under an agreement which was signed by himself and his next friend and registered in the county court, and so for all purposes was enforceable as a county court judgment, subsequently brought an action claiming damages from the employers for the same injury, alleging negligence and breach of statutory duty.

1944

ARABIAN v. TUFNALL AND TAYLOR, LD.

The defendants took the preliminary point that the registered agreement was an estoppel by record :—

Held, that, as it was no part of the duty of the registrar of the county court, before recording the agreement, to consider whether the plaintiff should rely on his rights under the Workmen's Compensation Act, 1925, rather than on his rights at common law, there was no estoppel, and, the trial judge being of opinion that the agreement was not for the infant's benefit (a principle which Parliament never intended should be affected by s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925), the action must proceed.

Stephens v. *Dudbridge Ironworks Co., Ld.* [1904] 2 K. B. 225, followed.

PRELIMINARY point taken in action before Wrottesley J.

In February, 1942, the plaintiff, a lad aged 17, while employed by the defendants in a factory at a horizontal milling machine, suffered an injury to his right hand. On October 25, 1942, the plaintiff and his next friend signed an agreement with his employers by which the employers agreed to pay to him workmen's compensation for the injury. The plaintiff and his next friend also signed the form applying to have a memorandum of the agreement registered in the Wandsworth county court in the special register provided for by ss. 23 and 25 of the Workmen's Compensation Act, 1925. The memorandum was duly recorded and became " for all purposes " enforceable as a county court judgment " as from October 19, 1942. Thenceforward the employers paid to the plaintiff compensation of 1*l*. 4*s*. a week under the agreement. On October 12, 1943, the plaintiff, by his next friend, claimed damages for the same injury in an action against the employers, alleging negligence and breach of statutory duty. The defendants pleaded and took the preliminary point that the registered agreement was an estoppel by record and that the action was barred (1).

Humfrey Edmunds for the defendants.
Edgedale for the plaintiff.

Cur. adv. vult.

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(1) By Workmen's Compensation Act, 1925, s. 29, sub-s. 1: " . . . . the workman may, at his " option, either claim compensa-" tion under this Act or take " proceedings independently of " this Act; but the employer " shall not be liable to pay com-" pensation for injury to a work-" man by accident arising out of " and in the course of the employ-" ment both independently of and " also under this Act . . . ."

1944

ARABIAN
v.
TUFNALL
AND TAYLOR,
LD.

July 5. WROTTESLEY J. read the following judgment. The plaintiff is an orphan and his father left property to Barclays Bank as trustees for the plaintiff and his sister. I thought it right to read the correspondence between the bank on behalf of the infant plaintiff and the defendant company's insurers although its admissibility was objected to by the defendants' counsel on the ground that the negotiations eventuated in an agreement. They did end in an agreement, but, since the court has to consider the interests of an infant who is said to be bound by the agreement, it has, not merely a right, but also a duty, to investigate all the circumstances surrounding the agreement. From the correspondence, the bank appears to have relied on the employers' claims agent or the insurers' solicitors for information both as to what had happened and generally as to the infant's rights. It is clear that the infant was never adequately advised by any competent person before entering into the agreement. Nor was it any part of the duty of the registrar of the county court at any time to consider whether this boy was wise to rely on his rights under the Workmen's Compensation Act, 1925, rather than those under the common law. The Act of 1925 and the Workmen's Compensation Rules are carefully framed to ensure that an infant's interests are considered by the registrar or judge, but only in order to see that he gets what is due to him under the Workmen's Compensation Act, 1925. If, therefore, the defendants' contention is right, the infant here must nurse his damaged hand as best he can, receiving for it only the compensation which a blameless employer must pay to a careless workman, though, in fact, the injury should turn out to be due to a neglect on the part of the employers of the various safeguards which should, under the Factory Acts, surround all workmen, to say nothing of those particularly enacted to protect boys.

This result would be particularly unfortunate, because I am satisfied that this agreement cannot have been for the infant's benefit for the reasons set out by Greer L.J. in *Murray* v. *Schwachman, Ld.* (1) and for other reasons on which I need not dilate. On the other hand, if I decide that the contention shall not prevail, but that the action may proceed, I am in peril of giving a judgment to a plaintiff who is already entitled to enforce, as though it were a judgment, the agreement to pay him 24*s.* 0*d.* a week, until in the nature of things this payment

(1) [1938] 1 K. B. 147.

is decreased as the plaintiff's capacity to earn is increased. No one suggests that I have any power to abate or annul this judgment. This state of affairs is not made less repugnant by the fact that s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, is aimed at preventing an employer, not merely from having to pay twice over for the same accident, but also from being harassed by two sets of proceedings.

In this dilemma, which might conveniently be resolved by Parliament when it has time, I think that the governing principle is that laid down in *Stephens* v. *Dudbridge Ironworks Co., Ld.* (1) that neither the exercise of an option nor the making of an agreement is binding in the case of an infant unless it is for his benefit. Parliament never meant by s. 29 to alter the law relating to infants and contracts. It is the interposition of the court, charged with the duty to watch over the infant's interests, that lends sanctity to a judgment for or against an infant and binds him. In proceedings in the High Court the matter is taken care of by R. S. C., Or. 22, rr. 14 and 15. In workmen's compensation cases the same matter is taken care of by the provisions of s. 25 of the Workmen's Compensation Act, 1925, but nowhere is there anything to enable the county court, still less to compel it, to investigate the question whether it is in the infant's interest that his rights at common law should be put an end to by a recorded agreement.

Until some such provision is made, I must give the infant the benefit of the general law, if I can without manifest injustice. In this case I can, for (1.) I can allow for the amounts he has received in assessing his damages, should he succeed, and (2.) I can accept his counsel's undertaking not to take any steps after judgment to enforce his agreement, for the reason that I should, if he succeeds before me, be of opinion that on the whole it is in the infant's interest that he should abandon his rights under the Workmen's Compensation Acts in order to assert his rights at common law. Turning to the authorities :— *Ware* v. *Whitlock* (2), following *Rhodes* v. *Soothill Wood Colliery Co.* (3), is authority for saying that, if an agreement signed by a next friend is recorded, it must stand like any other judgment and is binding in the same way and to the same extent as if it were a formal agreement actually entered into by persons themselves competent to agree, for the formalities laid down in the Act for the protection of the infant have been complied

(1) [1904] 2 K. B. 225.
(2) [1923] 2 K. B. 418.
(3) [1909] 1 K. B. 191.

1944

ARABIAN v. TUFNALL AND TAYLOR, LD.

Wrottesley J.

with. It could, therefore, be impeached only on the ground of fraud or some improper means. At first sight this decision presents a real difficulty in the way of the plaintiff, but what was decided there was that, so far as his remedies under the Workmen's Compensation Acts were concerned, the infant was bound. If it could be suggested that the county court before recording such an agreement had either the right or duty to consider whether the facts disclosed a case at common law against the employers, the case would be very different, but it is clear from s. 25, sub-s. 4, of the Workmen's Compensation Act, 1925, that the county court judge shall have regard to the question whether or not liability to pay compensation under the Act is doubtful, and this by implication seems to me to disable the judge from considering the infant's rights at common law. In other words, the estoppel by record relied on here is limited to proceedings under the Workmen's Compensation Acts, and the case must proceed.

Judgment accordingly.

Solicitors for defendants: *J. Lilly.*
Solicitors for plaintiff : *W. H. Thompson.*

C. G. M.

MAITLAND v. RAISBECK AND R. T. AND J. HEWITT, LIMITED.

C. A.

1944
July 10.

Lord Greene M.R., MacKinnon and Luxmoore L.JJ.

Nuisance —Highway—Collision—Absence of negligence.

Every person has a right to use the public highway. If, while he is using it, something happens to him which causes an obstruction to the highway, but is in no way referable to his fault, it is wrong to suppose that ipso facto and immediately a nuisance is created. It must depend on the facts of each case whether or not a nuisance is created.

Ware v. *Garston Haulage Co., Ld.*, ante p. 30, explained and distinguished.

APPEAL from Morpeth and Blyth county court.

The plaintiff was making a journey on a dark night in a motor omnibus owned by the first defendant. The omnibus collided with a lorry owned by the second defendants, and the plaintiff was injured. The lorry was moving slowly in the same direction as the omnibus, but the rear light of the lorry had gone

Reported by F. R. R. Burford, Esq., Barrister-at-Law.

C. A.
1944

MAITLAND
v.
RAISBECK
AND R. T.
AND
J. HEWITT,
LD.

out. In an action by the plaintiff in the county court, the county court judge found that the driver of the omnibus had not been negligent, and he dismissed the action so far as it was against the first defendant. With regard to the action against the second defendants the judge held that the driver of the lorry had not been negligent and that the second defendants and their servant (the driver of the lorry) were not liable on the ground of nuisance created or maintained by them. The plaintiff, therefore, failed in both parts of his action, and he lodged an appeal against the decision so far as it concerned the second defendants. The appeal was based on the allegation of nuisance, and that was the only question argued before the Court of Appeal.

Petrie for the plaintiff. Even if the second defendants are not liable on the ground of negligence, they were guilty of causing an actionable nuisance on the highway: *Ware* v. *Garston Haulage Co., Ld.* (1); *Roberts* v. *Paulusz* (2). The lorry, with its rear light extinguished, constituted a nuisance on the highway and the second defendants as owners of the vehicle are, therefore, liable. It is immaterial whether or not the driver of the lorry knew that the rear light was out or whether or not he was negligent. In *Roberts* v. *Paulusz* (2) the plaintiff failed in his action, but there are certain passages in the judgments of the Court of Appeal, especially in the judgment of du Parcq L.J., which could be used to support the claims of the plaintiff in the present case.

Beney K.C. and *A. D. Karmel* for the second defendants. *Ware's* case (1) is only an authority for cases founded on similar facts. The facts in *Ware's* case (1) can readily be distinguished from those with which we are at present concerned.

Whether an actionable nuisance of the nature suggested has been created depends upon the facts, and the facts in the present case do not amount to a nuisance. *Attorney-General* v. *W. H. Smith and Sons* (3); *Wing* v. *London General Omnibus Co.* (4); *Phillips* v. *Britannia Hygienic Laundry Co.* (5). The county court judge did not take the view of *Ware's* case (1) for which the plaintiff has contended, and the judge was right. It is for the plaintiff to prove that the facts in this case amounted to an actionable nuisance, but he has failed to do so.

(1) Ante p. 30.
(2) (1941) Unreported.
(3) (1910) 103 L. T. 96.
(4) [1909] 2 K. B. 652.
(5) [1923] 2 K. B. 832.

Petrie in reply. The legal attitude towards liability for accidents on the highway has changed greatly since *Phillips* v. *Britannia Hygienic Laundry Co.* (1). This is shown by such measures as the provisions for compulsory insurance and other statutory measures of recent times. The facts in *Ware's* case (2) were not sufficiently dissimilar to those in the present case to justify the court coming to a different decision from that reached in *Ware's* case (2).

The second defendants in the present case put a vehicle on the road which turned out to be defective and although the resulting accident may not have been their fault, they should be held liable for nuisance.

LORD GREENE M.R. It is a misfortune for the plaintiff that, as things have turned out, he has no remedy against either of the defendants. On the case as framed below there can be no question of negligence as against the second defendants, the owners of the lorry. No case of negligence was raised which was based on an allegation that they put on the road a lorry with a defective lighting system which with reasonable care they ought to have detected and put right. No such case was made and the evidence clearly would be insufficient for us to draw any inference in that respect. Indeed, in opening the appeal, Mr. Petrie did not attempt to put his case on any allegation of negligence. The ground on which he put it was purely that of nuisance.

We must approach this question of nuisance on the footing of the county court judge's finding that there was no negligence on the part of the second defendants in respect of the extinction of this rear light. In other words, we assume that the rear light went out for some reason not referable to any negligence on the part of the second defendants. It was, therefore, a misfortune which occurred to the lorry without any fault by them. It is argued that, apart from the driver's knowledge or lack of knowledge that the light was out, and apart from any suggestion of negligence, the mere fact that the light was out at the time, of necessity turned the lorry into a nuisance on the highway. That is a proposition which the county court judge refused to accept, and in my opinion, he was right in doing so. Every person who uses the highway must exercise due care, but he has a right to use the highway, and, if something happens to him which, in fact, causes an obstruction to the highway, but is in no way referable to his fault, it is wrong to suppose that ipso facto and immediately a nuisance is created. A nuisance will obviously be created if he allows the obstruction to continue for an unreasonable time or in unreasonable circumstances, but the mere fact that an obstruction has come into existence cannot turn it into a nuisance. It must depend on the facts of each case whether or not a nuisance is created. If that were not so, it would seem that every driver of a vehicle on the road would be turned into an insurer in respect of latent defects in his machine.

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(1) [1923] 2 K. B. 832.

(2) Ante p. 30.

No authority is quoted for the proposition that such is the law except one case recently decided by the Court of Appeal, namely, *Ware* v. *Garston Haulage Co., Ld.* (1). I do not suppose I shall be wrong if I say that I am certain that the members of the court on that occasion would have been extremely surprised if they had known that *Ware's* case (1) would be reported as laying down some new principle of law. It was a case of very special facts, and the observations of Scott L.J., in which MacKinnon L.J. and Goddard L.J. concurred, were made in reference to those facts. It would be wrong, therefore, to pick sentences out of the judgment and treat them as being of general application. It often happens that in the case of a judgment delivered extempore on special facts the language of a judge who is thinking of those facts is couched in words which, if taken out of their context, appear to have some general application. For that reason to report a case of that character is apt to mislead the profession. The facts of *Ware's* case (1) were as much unlike the facts of the present case as any facts could be. A motor lorry with a trailer broke down on the highway early in the morning and remained there all day. At nightfall according to the men on the lorry they tried the lights and found that they were all working. The judge had some suspicion about that, but the men went away at 7.20 p.m. (which, as it was in November, was after dark) to get some hurricane lamps. While they were away the lamps on the lorry went out, and the judge suspected strongly that they knew they were defective. When the men returned they found that an accident had happened. That was a case where there was ample time for the men to take all proper precautions to ensure that the earlier accident which had occurred to them and for which they were not responsible should not develop into a nuisance to the highway.

(1) Ante p. 30.

Of course, if a person has an accident for which he is in no way responsible the time may come when failure to take some appropriate steps on his part will render him liable for maintaining a nuisance to the highway. It was suggested that *Ware's* case (1) decided that a nuisance is created ipso facto and immediately if an accident causes an obstruction. The language of Scott L.J., if taken literally and out of context with the facts, might lead to the view that that was the law, but any such view, if treated as a general proposition would, in my judgment, run contrary to the recognized law on the question of nuisance to highways. The user of the highway is entitled to use it in a reasonable manner and to expect other people to do the same, but on the highway accidents happen when both parties have been reasonable and neither has misused the highway. If damage arises in those circumstances, the person injured must put up with it. In the present case, the drivers of both the omnibus and the lorry having been acquitted of negligence, there remains nothing but the allegation of nuisance. In my opinion, on the facts the county court judge was right in saying that nuisance was not established. The appeal must be dismissed.

MacKinnon L.J. I agree.

Luxmoore L.J. I also agree.

Appeal dismissed.

Solicitors for plaintiff: *Grundy, Izod & Co., for William Webb & Son, Morpeth.*

Solicitors for second defendants: *R. I. Lewis & Co.*

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(1) Ante p. 30.

CONSTANTINE *v.* IMPERIAL HOTELS, LIMITED.

1944
June 19, 21, 28.
Birkett J.

Innkeeper—Refusal to accommodate traveller—Action for tort, in case—Need to prove special damage—Two inns owned by innkeeper—Accommodation refused at one and supplied at other.

An action by a traveller against an innkeeper for wrongfully refusing to receive and lodge him is for the violation of a right at common law so that the action, although sounding in case, can be sustained without proof of special damage.

1944

CONSTANTINE
v.
IMPERIAL
HOTELS, LD.

Ashby v. *White* (1703); Smith's Leading Cases (13th ed.) vol. I, p. 253, followed.

An innkeeper owned two inns in the same vicinity. A traveller asked for accommodation at one of them and was refused, but he was supplied with accommodation at the other:—

Held, that the innkeeper was in breach of his duty at common law.

ACTION tried by Birkett J.

The plaintiff, the well-known West Indian cricketer, claimed damages from the defendants, the proprietors of the Imperial Hotel and also of the Bedford Hotel, London, both of which were in the same neighbourhood, for refusing to receive and lodge him at the Imperial Hotel, on July 30, 1943. The defendants denied that they had refused to receive and lodge the plaintiff at the Imperial Hotel, but pleaded that, after he had been received into the Imperial Hotel, he left that hotel voluntarily the same evening and was accommodated at the Bedford Hotel. Although the plaintiff had a contract with the defendants for the reception of his wife, his daughter and himself at the Imperial Hotel, no claim was made in contract. No special damage was pleaded or proved. The defendants conceded that they were innkeepers and that the Imperial Hotel was a common inn; that the plaintiff came to the Imperial Hotel on July 30, 1943, and requested the defendants to receive and lodge him as a traveller; that the defendants had sufficient room for receiving him at the hotel; that the plaintiff was ready and willing to pay all proper charges for his accommodation; and that the plaintiff was a man of high character and that, although he was a man of colour, no ground existed on which the defendants were entitled to refuse to receive and lodge him at the hotel. Birkett J., found that the defendants refused to receive and lodge the plaintiff.

Slade K.C. and *Aiken Watson* for the defendants. This action is framed in tort, on the ground that accommodation which was available was refused by the innkeepers to a traveller without lawful excuse: see *Hawthorn* v. *Hammond* (1); *Fell* v. *Knight* (2); Bullen and Leake's Precedents of Pleadings, 3rd ed., p. 343, and Halsbury's Laws of England, 2nd ed., vol. 18, pp. 147, 148, par. 204. Being an action on the case (see Statute of Westminster 2, 1285 (13 Ed. 1, c. 24)), damage

(1) (1844) 1 Car. & Kir. 404.

(2) (1841) 8 M. & W. 269.

is the gist of the action. Without proof of such damage, there is no cause of action: Holdsworth's History of English Law, vol. 8, p. 449; Salmond on the Law of Torts, 9th ed., p. 5; Broom's Common Law, 9th ed., pp. 746, 754, 757 and 768-9; and Jenks' Book of English Law, 4th ed., pp. 416-17; but no special damage has been either proved or pleaded here. There are, no doubt, exceptions to the rule that damage is the gist of an action sounding in case, but always for some reason of historical development. In actions for slander (apart from the well-known exceptions) the general rule derived from the common law is observed, namely, that damage must be proved, but in actions for libel, damage need not be proved since such actions were originally in the nature of criminal proceedings in the Star Chamber: Salmond on the Law of Torts, 9th ed., p. 397; Holdsworth's History of English Law, vol. 8, pp. 361, 363; Fraser on Libel and Slander, 7th ed., p. 26; and Spencer Bower on Actionable Defamation, 2nd ed., p. 152; but an action for a false statement disparaging a trader's goods or for injurious falsehood will not lie, where no special damage is proved: *White* v. *Mellin* (1); *Ratcliffe* v. *Evans* (2). In *Neville* v. *London "Express" Newspaper, Ld.* (3) the majority of the House of Lords held that an action for damages for maintenance will not lie in the absence of special damage. The same rule derived from the common law applies in the case of actions for conspiracy. In actions for malicious prosecution Holt C.J. in *Savile* v. *Roberts* (4) said that the plaintiff must prove damage (1.) to his fame, "as if the matter whereof he is accused be scandalous"; (2.) to his person; or (3.) to his property. That kind of action, therefore, is regarded as being in harmony with an action for libel as involving defamation of the plaintiff. In any event, the defendants did provide accommodation for the plaintiff and so there was no tort. They were only bound to provide him with reasonable accommodation: *Fell* v. *Knight* (5). If they refused him accommodation at the Imperial Hotel, they nevertheless accommodated him at the Bedford Hotel, and thus they performed their obligation at common law. [*Lamond* v. *Richard and the Gordon Hotels, Ld.* (6) was referred to.] Lastly, the plaintiff on these facts had a good cause of action for breach of contract for which the

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(1) [1895] A. C. 154, 163.
(2) [1892] 2 Q. B. 524, 528.
(3) [1919] A. C. 368.
(4) (1698) 1 Ld. Raym. 374, 378.
(5) 8 M. & W. 269.
(6) [1897] 1 Q. B. 541.

1944

CONSTANTINE *v.* IMPERIAL HOTELS, LD.

damages would have been nominal. He cannot secure more damages by framing his action in tort: [*Groom* v. *Crocker* (1) was referred to.]

Sir Patrick Hastings K.C. and *Rose Heilbron* for the plaintiff. Many actions sounding in case can be sustained without proof of special damage. Those of libel and malicious prosecution have already been mentioned. This action is for infringement of a right granted by common law—and, therefore, damage will be presumed: *Ashby* v. *White* (2), where Holt C.J. said (3): "If the plaintiff has a right, he must of necessity have a means "to vindicate and maintain it, and a remedy if he is injured "in the exercise or enjoyment of it; and indeed it is a vain "thing to imagine a right without a remedy; for want of "right and want of remedy are reciprocal." Again (4): "This right of voting is a right in the plaintiff by the common "law, and consequently he shall maintain an action for the "obstruction of it . . . . My brother Powell indeed thinks "that an action upon the case is not maintainable, because "here is no hurt or damage to the plaintiff; but surely "every injury imports a damage . . . . for a damage is not "merely pecuniary, but an injury imports a damage, when "a man is thereby hindred of his right." In *Embrey* v. *Owen* (5), Parke, B., said: "Actual perceptible damage is not "indispensable as the foundation of an action; it is sufficient "to shew the violation of a right in which case the law will "presume damage." Lord Finlay, L.C., one of the majority, said in *Neville* v. *London "Express" Newspaper, Ld.* (6): "Of "course, if a right has been infringed, as in *Ashby* v. *White* (2) "where a man was deprived of his right to vote, no proof of "damage is necessary." The reasoning of the minority of the Law Lords—Viscount Haldane and Lord Atkinson—that the mere invasion of the plaintiff's legal right imports damage and is sufficient to maintain an action, should be followed here. It is clear that there was an invasion of the plaintiff's common law right by the refusal to accommodate him at the Imperial Hotel, and the fact that he received accommodation at the Bedford Hotel is immaterial: *Rothfield* v. *North British Railway Company* (7). The plaintiff is entitled to substantial damages.

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(1) [1939] 1 K. B. 194.

(2) (1703) 2 Ld. Raym. 938; 3 Ld. Raym. 320; Smith's Leading Cases (13th ed.), Vol. I, 253; Howell's State Trials, Vol. XIV, 695

(3) Smith's Leading Cases (13th ed.) vol. 1, 273.

(4) Ibid. 274.

(5) (1851) 6 Exch. 368.

(6) [1919] A. C. 379.

(7) 1920 S. C. 805.

Slade K.C. replied.

June 28. BIRKETT J., read the following judgment: Before dealing with the main proposition of law advanced by Mr. Slade, I ought perhaps to deal with a further submission made by him: that, as Mr. Constantine went to the Bedford Hotel on the night in question, after leaving the Imperial Hotel, and was received and lodged there, the defendants were in the same position as though he had been received and lodged at the Imperial Hotel, and there had, therefore, been no refusal on which Mr. Constantine could rely. I reject this contention. Apart from the fact that the two hotels were in the same ownership, no further evidence was given as to the relationship between them, and the circumstances in which Mr. Constantine removed to the Bedford Hotel were such that it is impossible to find that the defendants did not refuse to receive and lodge Mr. Constantine. In *Rothfield* v. *North British Railway Co.*, Lord Anderson said (1): "It was "suggested that, as the pursuer might have obtained accommo- "dation at another hotel in Edinburgh, he was not entitled to "insist on obtaining it at the defenders' hotel. I do not agree. "A traveller is, in my opinion, entitled to choose the hotel "at which he desires to be a guest, and the defenders are not "entitled to put a traveller, desiring to use their hotel, to the "trouble and expense of finding another hotel." In *Fell* v. *Knight* (2), it was held that an innkeeper was only bound to provide reasonable accommodation, and the defendants through Mr. Slade said that, by offering accommodation at the Bedford Hotel, they had fulfilled their duty. I cannot accept this view. The claim before me is that the defendants refused to receive and lodge Mr. Constantine at the Imperial Hotel, and I hold it to be no answer that Mr. Constantine went to the Bedford Hotel under protest.

The first and main submission of the defendants was that the present action is an action on the case, that the gist of an action on the case is the damage actually suffered and proved, and here no damage was suffered and no special damage is either alleged or proved. The Statute of Westminster, 2, 1285, authorizing the writ "in consimili casu" produced the writs which were classified under the common denomination "writs of trespass on the case," and the actions on the case based on them included—certainly from very early times—the

(1) 1920 S.C. 805, 812. (2) 8 M. & W. 269.

present form of action before me. This action was based on the common law and on what was termed the custom of the realm. The distinction between the writ of trespass and the writ of trespass on the case would appear to be that trespass was the appropriate remedy for the direct invasion of a right by force either actual or implied by law, and case was the remedy for a wrong in which one at least of those elements was lacking. In an ordinary trespass, in which a forcible act directly caused damage to the plaintiff's person or property, the connexion between the act and the damage was usually obvious, and the damage was presumed, but in case the damage arising from the wrongful act was the gist of the action. Indeed, it has been said by the late Sir William Holdsworth that the constant need to inquire whether the damage complained of was the proximate consequence of the act of the defendant familiarized the courts with the comparatively modern conception of the idea of negligence in law, but, although it was the general rule that damage was the gist of an action on the case and although without question the action before me is an action on the case, it is said by Sir Patrick Hastings that that rule is by no means an inflexible rule and that in certain cases, of which he says this is one, damage will be presumed and that Mr. Constantine can recover.

It is to be observed that *White's* case (1) ; *Fell* v. *Knight* (2) ; and *Hawthorn* v. *Hammond* (3) ; were all actions on the case, and, incidentally, an indictment may be brought, as in *Reg.*v. *Sprague* (4), which was brought so recently as 1891 at Surrey quarter sessions and shows that an innkeeper could be indicted, and, indeed, in that case was indicted, for not receiving a guest who was attired in what in those days was called rational dress. The great and celebrated case of *Ashby* v. *White* (5), it must always be remembered, was itself an action on the case, and I observed in reading the very interesting argument in Howell's State Trials, vol. 14, that the Mr. Slade of that day used the very language that the Mr. Slade of this day used before me—that the action would not lie inasmuch as it was an action on the case, that damage was the gist of the action, and that no damage had been proved or could be presumed.

(1) (1558) 2 Dyer 158, b.
(2) 8 M. & W. 269.
(3) 1 Car. & Kir. 404.
(4) (1899) 63 J. P. 233.
(5) 2 Ld. Raym. 938 ; 3 Ld. Raym. 320 ; Smith's Leading Cases (13th ed.), vol. I, 253 ; Howell's State Trials, vol. XIV, 695.

Reference was also made to the action for defamation, which is, of course, an action on the case, but in libel damage need not be proved. It is presumed. The action for slander is an action on the case. In certain specified cases, however, damage need not be proved, but is presumed. These matters go very far back into the history of law. In the beginning of the sixteenth century the common law courts began to take from the ecclesiastical courts most of the suits for defamation. The common law remedy was an action on the case and damage was undoubtedly the gist of the action, but the Court of Star Chamber regarded defamation as a crime, and, when the Court of Star Chamber was abolished, the law of defamation included these two separate and divergent parts derived from the common law and from the Court of Star Chamber. In slander, too, by the middle of the seventeenth century the categories that we know today so well, in which words are actionable per se had been established, the imputation of a criminal offence punishable by imprisonment, the imputation of a contagious disease, or the imputation of unfitness for carrying on a trade or profession. The first of these categories arose from an attempt to distinguish the spheres of jurisdiction of the common law courts and the ecclesiastical courts : the others, most probably, on the obvious tendency of the imputation itself to cause damage. In libel, after the Restoration, the courts held that libel was a wrongful act from which damage could be presumed, but in slander no extension of the settled categories is permitted to this day. In *Jones* v. *Jones* (1), Lord Wrenbury, in his speech in the House of Lords, said (2) : " The fact that the imputation is a gross and " grievous attack upon personal character is not of itself " enough. For otherwise a statute would not have been " necessary to enable a woman or a girl to sue for slander " upon her chastity. The imputation must be such and the " state of facts such, *not* as that a judge would necessarily " or reasonably presume or infer damage, but as that judges " in the past have presumed or inferred damage. This involves " a confession which I fear must be made, that the law of " slander rests not upon any principle whose elasticity will " admit new cases, but upon artificial distinctions. An " artificial and arbitrary rule is not a principle. The plaintiff " must for success bring his case within the very limited class " of cases in which slander has been held actionable. He

(1) [1916] 2 A. C. 481.

(2) Ibid. 506.

"must show that the imputation is such and the state of "facts is such as that a presumption of damage as matter of "law has been made in the past under like circumstances. "I am of course here speaking, and throughout this opinion "I am speaking, of cases in which damage is not proved." For a most exhaustive discussion of the artificial law of slander Viscount Haldane's speech in that case may be referred to (1). The fact, therefore, that libel is an action on the case and yet damage is to be presumed is based on the historical development of the law of defamation, as is the highly artificial position of the law of slander, and it affords me little help in the question which I have to decide today.

Reference was also made in the course of the argument, both by Mr. Slade and by Sir Patrick Hastings, to the action for malicious prosecution. It was the development of the action on the case, founded on the statutory writ of conspiracy, which gave rise to the tort of malicious prosecution. Holt C.J., defines the law in *Savile* v. *Roberts* (2). It is to be noted that, among other things, he laid down that the plaintiff must prove one of three kinds of damage: (1.) damage to his fair fame; (2.) damage to his person; (3.) damage to his property. The ground of the action was not conspiracy, but the damage, and as a rule no action will lie for bringing a civil action maliciously, but the bringing of a prosecution maliciously may give rise to an action on the case if special damage is proved. In *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (3), Bowen L.J., said (4): "The reason why, to my "mind, the bringing of an action under our present rules of "procedure and under our present law, even if it is brought "without reasonable or probable cause and with malice, gives "rise to no ground of complaint appears to me easily to be seen "upon referring to the doctrine laid down by Holt C.J., in *Savile* "v. *Roberts* (5)." Then he refers to the three matters which I have mentioned as to the kinds of damage. Bowen L.J., continued: "It is clear that Holt C.J., considered one of "those three heads of damage necessary to support an action "for malicious prosecution. To apply this test to any action "that can be conceived under our present mode of procedure "and under our present law, it seems to me that no mere "bringing of an action, although it is brought maliciously and

(1) [1916] 2 A.C. 487.
(2) (1698) 1 Ld. Raym. 374.
(3) (1883) 11 Q. B. D. 674.
(4) Ibid. 689.
(5) 1 Ld. Raym. 374.

"without reasonable or probable cause, will give rise to an "action for malicious prosecution." In a passage which I have had continually before me in considering this case he said (1): "Although every judge of the present day will be swift to "do justice and slow to allow himself as to matters of justice "to be encumbered with either precedents or technicalities, "still every wise judge who sits to administer justice must feel "the greatest respect for the wisdom of the past, and the "wisdom of the past presents us with no decisive authority "for the broad proposition in its entirety which the counsel "for the plaintiff company have put forward. But although "an action does not give rise to an action for malicious "prosecution, inasmuch as it does not necessarily or naturally "involve damage, there are legal proceedings which do "necessarily and naturally involve that damage; and when "proceedings of that kind have been taken falsely and "maliciously, and without reasonable or probable cause, "then, inasmuch as an injury has been done, the law gives "a remedy. Such proceedings are indictments—I do not say "every indictment, but I mean all indictments involving "either scandal to reputation or the possible loss of liberty "to the person, that is, all ordinary indictments for ordinary "offences. In its very nature the presentation or the "prosecution of an indictment involves damage, which cannot "be afterwards repaired by the failure of the proceedings, to "the fair fame of the person assailed, and for that reason, as "it seems to me, the law considers that to present and "prosecute an indictment falsely and without reasonable or "probable cause is a foundation for a subsequent action for "a malicious prosecution."

Mr. Slade further relied on the decision of the House of Lords in *Neville* v. *London "Express" Newspaper, Ld.* (2), clearly an authority of very great importance. It dealt with most interesting questions about the tort of maintenance. In the middle ages the offence of maintenance was treated, as was defamation and conspiracy, both as a crime and as a tort, but in modern times it came to be regarded as a tort rather than a crime. In defamation and conspiracy the civil action was an action on the case in which damage was the gist of the action, but in maintenance it appears to have been "doubtful whether the action was not an action in the nature

(1) 11 Q. B. D. 691. (2) [1919] A. C. 368.

1944

CON-
STANTINE
v.
IMPERIAL
HOTELS, LD.

Birkett J.

of trespass, in which nominal damages could be recovered." In *Neville* v. *London "Express" Newspaper, Ld.* (1), two very closely connected questions were decided. The first was whether an action for maintenance would lie in the absence of proof of special damage, which is mutatis mutandis the question which I have to decide in the present case, and the second question, closely allied, was whether the success of the maintained litigation was a bar to the action. The decision of the majority of the House of Lords—Lord Finlay L.C., Lord Shaw and Lord Phillimore—was that the action would not lie in the absence of proof of special damage, and Mr. Slade pressed that decision on me in this case. Viscount Haldane and Lord Atkinson dissented, and Sir Patrick Hastings said that, although I was bound by the majority decision if this were a matter of maintenance, the principles enunciated by the dissentient lords were applicable to the facts before me. The dissentient lords thought that, as maintenance was admittedly illegal, the law should give a remedy in tort for nominal damages as in the case of trespass and libel since, as Lord Atkinson said (2), "the mere invasion of the plaintiff's legal right imports damage "and is sufficient to maintain the action." If conduct be illegal, or, indeed, criminal, it does not necessarily follow that an action in tort for nominal damages will lie. If the action for maintenance is not to be regarded as an action on the case analogous to trespass, no doubt an action would lie for nominal damages, but the majority of the House of Lords treated the action as an action on the case and applied the general rule in that case. On the second question the majority of the House of Lords—Lord Finlay L.C., and Viscount Haldane, and Lord Atkinson—held that the success of the maintained litigation was not a bar to the right of action for maintenance. This is, if one may say so with the very deepest respect, in apparent conflict with the decision on the first question, for, if the maintained litigation was just and succeeded and is not a bar to the action, the plaintiff could scarcely claim anything but nominal damages, and, according to the answer to the first question, the action for nominal damages will not lie. There is a passage in the speech of Lord Finlay which I think is of importance in the present case. He said (3): "The action "for maintenance is, in my opinion, one which can be sustained "only if special damage has been occasioned to the plaintiff

(1) [1919] A. C. 368.
(2) Ibid. 405.
(3) Ibid. 379.

"by the maintenance. The maintenance may be punishable "as an offence, but to give a right of action the commission "of the offence must have caused damage to the plaintiff. "Of course, if a right has been infringed, as in *Ashby* v. *White* (1), where a man was deprived of his right to vote, no "proof of damage is necessary. As Lord Holt expressed it, "'an injury imports a damage, when a man is thereby "'hindred of his right'." Lord Finlay, speaking of damages, said (2): "As there was no damage in the present case, I am "of opinion that the action for maintenance must fail and that "judgment must therefore be entered for the defendants on "this head of claim. I think it would be futile to send the "case down for a new trial, even if it were regarded as one "in which for the maintenance of the action proof of damage "is not necessary. We have all the facts before us and it is "clear that, even on this view, only nominal damages could "be recovered. Any verdict giving substantial damages on "these facts would be perverse and would be set aside. If "then the action for maintenance were to be regarded as one "for the invasion of a right, to sustain which special damage is "not necessary, the proper course would be to give judgment "for the plaintiff for nominal damages. But, in my opinion, "this head of claim fails altogether." I need not cite other than a passage from the dissentient judgment of Viscount Haldane which shows quite clearly that what he was there doing was to say that in the action for maintenance the proper principle to be applied was the principle which is enunciated by Holt C.J., in *Ashby* v. *White* (1). He said (3): "As Lord Holt "showed in *Ashby* v. *White* (1), every violation of a right "imports damage in contemplation of law. This principle "applies whether the right arises out of a contract, as in "*Marzetti* v. *Williams* (4), or out of a tort, as in *Embrey* v. "*Owen* (5). The damage may be substantial, but may also "amount to what is merely nominal." A little later, after quoting Parke B., he said (6): "But where the right is, as it "often is, an absolute right the doctrine laid down by Lord "Holt in *Ashby* v. *White* (1) applies, and every infringement "of such an absolute right gives a claim to nominal damages,

(1) 2 Ld. Raym. 938; 3 Ld. Raym. 320; Smith's Leading Cases (13th ed.) vol. I, 253; Howell's State Trials, vol. XIV, 695.

(2) [1919] A. C. 381.

(3) Ibid. 392.

(4) (1830) 1 B. and Ad. 415.

(5) 6 Ex. 353.

(6) [1919] A. C. 392.

"even though all actual loss or injury is disproved." At the end of his opinion Viscount Haldane said (1): "Under these "circumstances I think he was entitled to no more than "nominal damages for the violation of his right, and that the "jury ought to have been directed to this effect. I think "that justice will be done if judgment on the claim for "maintenance is entered for him for merely nominal damages, "unless the jury on a new trial think that exemplary damages "should be given. No direction suggesting such damages "should be given." It is clear, therefore, on that case that the real point to be decided was with what class of case the House of Lords was dealing, the majority saying that it was an action founded on case, in which special damage is essential, and Viscount Haldane and Lord Atkinson saying that it was a claim which was akin to the action in *Ashby* v. *White* (2).

The case before me is admittedly in the form of an action on the case, but Sir Patrick Hastings' main contention was that this was a case in which the law will presume damage, and that the decision in *Neville* v. *London "Express" Newspaper, Ld.* (3) does not affect the matter. He relied very strongly on *Ashby* v. *White* (2) which is reported very fully in Howell's State Trials, where the contentions before the court are very clearly set out and discussed. In that case Holt C.J. said (4): "The single question in this case is, whether, if a free burgess "of a corporation, who has an undoubted right to give his "vote in the election of a burgess to serve in Parliament, be "refused and hindered to give it by the officer, an action "on the case will lie against such officer? I am of opinion "that judgment ought to be given in this case for the "plaintiff." Later comes the famous passage on which Sir Patrick Hastings relied and which was the passage cited by the dissentient lords in *Neville* v. *London "Express" Newspaper, Ld.* (3). Holt C.J. said (5): "If the plaintiff has a right, he "must of necessity have a means to vindicate and maintain "it, and a remedy if he is injured in the exercise or enjoyment "of it; and, indeed, it is a vain thing to imagine a right "without a remedy; for want of right and want of remedy "are reciprocal." . . . . (6) "And I am of opinion that this

(1) [1919] A. C. 392.

(2) 2 Ld. Raym. 938; 3 Ld. Raym. 320; Smith's Leading Cases (13th ed.), vol. I, 253; Howell's State Trials, vol. XIV, 695

(3) [1919] A. C. 368.

(4) Smith's Leading Cases (13th ed.), vol. I, 268.

(5) Ibid. 273.

(6) Ibid. 273.

"action on the case is a proper action. My brother Powell "indeed thinks that an action upon the case is not maintainable, because there is no hurt or damage to the plaintiff; "but surely every injury imports a damage, though it does not "cost the party one farthing, and it is impossible to prove "the contrary; for *a damage is not merely pecuniary, but an* "*injury imports a damage, when a man is thereby hindred of* "*his right.*"

Is the principle of that case to be applied to the facts of the present matter? In *Embrey* v. *Owen* (1), Parke B. said (2): "It was very ably argued before us by the learned counsel "for the plaintiffs that the plaintiffs had a *right* to the full "flow of the water in its natural course and abundance, as an "incident to their property in the land through which it "flowed; and that any abstraction of the water, however "inconsiderable, by another riparian proprietor, and though "productive of no actual damage, would be actionable, "because it was an injury *to a right* and, if continued, would "be the foundation of a claim of adverse right in that "proprietor. We by no means dispute the truth of this "proposition, with respect to every description of right. "Actual perceptible damage is not indispensable as the "foundation of an action; it is sufficient to show the violation "of a right, in which case the law will presume damage; "injuria sine damno is actionable, as was laid down in the "the case of *Ashby* v. *White* by Lord Holt, and in many "subsequent cases, which are all referred to, and the truth "of the proposition powerfully enforced in a very able "judgment of the late Story J. in *Webb* v. *Portland Manu-* "*facturing Co.*" (3). In the case cited, Story J. said: "But "I am not able to understand how it can correctly be said, in "a legal sense, that an action will not lie, even in the case "of a wrong or violation of a right, unless it is followed by "some perceptible damage which can be established as "a matter of fact; in other words, that injuria sine damno "is not actionable. On the contrary, from my earliest reading, "I have considered it laid up among the very elements of the "common law that, wherever there is a wrong, there is "a remedy to redress it; that every injury imports damage "in the nature of it; and, if no other damage is established,

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(1) 6 Ex. 353.

(2) Ibid. 368.

(3) (1838) 3 Sumner Rep. 189.

"the party injured is entitled to a verdict for nominal damages."

The last case to which I need refer is *Rothfield* v. *North British Railway Co.* (1). Mr. Rothfield brought a claim against the railway company for refusing to allow him to stay at their hotel, the North British Station Hotel, at Edinburgh. Lord Anderson, on the hearing of the case, awarded him on the first hearing one guinea damages. There were further matters, but, finally, it was decided by the full court that the defendants were entitled to refuse to receive Mr. Rothfield in their hotel. From the report it appears that: "On November 8, 1918, the Lord Ordinary (Lord "Anderson), after a hearing in the Procedure Roll, being of "opinion that he could decide the case without any inquiry "into the facts, found and declared in terms of the declaratory "conclusions of the summons, and found the pursuer entitled "to damages, which he assessed at the sum of one guinea." The form of the action there was (*a*) for a declaration, and (*b*) for damages, and the damages that were claimed were stated to be "for payment by the defenders of the sum of "105*l*. in the name of damages." The judgment of Lord Anderson is most exhaustive and instructive on both the English and the Scots law. The matter came a second time before the Lord Ordinary when he affirmed his previous decision. Then the Lord Justice Clerk said (2): "He therefore"—the pursuer—"raised the present action to have his rights "declared," and later: "The origin and development of this "branch of the law have been different in England and "Scotland. In England it is apparently based on the 'custom "'of England,' and has been the subject of many judicial "determinations. In Scotland it had its origin in statutory "provisions in the fifteenth century, and has received little "elucidation by judicial utterances, so far as the question "raised in the present case is concerned." Again: "But, if "I may take the judgment of Lord Alverstone in *Browne* v. "*Brandt* (3) as correctly stating the law of England, there "does not seem to be much, if any, difference in the result "between the laws of England and of Scotland on this "subject." I cite passages from this case because they may be helpful as showing what other minds felt on similar facts. The Lord Justice Clerk also said (4): "Further, if members

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(1) 1920 S. C. 805.
(2) Ibid. 825.
(3) [1902] 1 K. B. 696.
(4) 1920 S. C. 827.

1944

CONSTANTINE
v.
IMPERIAL
HOTELS, LD.

Birkett J.

“ of the public have rights as to accommodation in an hotel, ... which I think they have, and if the keeper of an hotel is subject to the liabilities before referred to, then I am inclined to think that an action of declarator”—which is similar to our action for a declaration—“ may be competently brought by a traveller, who desires to establish the existence of these rights and liabilities, against an hotel keeper who refuses to recognise them, when the traveller legitimately and properly asks that they should be recognised and accorded to him, or, in the appropriate circumstances, puts forward his claim to have these rights declared. I am further inclined to be of opinion that the denial of such rights and liabilities, when legitimately and properly required to be recognised and observed by an individual traveller, would justify an appropriate action of declarator and damages, though the damages awarded might, of course, be merely nominal. I am not satisfied that a declaratory conclusion is an essential preliminary to a conclusion for damages in such an action.” Lord Dundas said (1): “ The pursuer concludes for 105*l.* in name of damages. A claim of that nature must, I think, be supported by averment and proof of some actual legal wrong sustained by the pursuer, for which the defenders are responsible.” Then he discussed whether there was in fact any legal wrong and concluded (2): “ A general denial of the pursuer's statement of his alleged rights does not, in my judgment, constitute the infliction of a legal wrong sounding in damages.” Lord Salvesen said (3): “ There is, therefore, no evidence upon which we are entitled judicially to proceed of the pursuer having suffered any legal wrong from which a claim of damages, however nominal, might emerge.” Lord Ormidale said (4): “ In this action the pursuer seeks to recover damages. He avers that he made application as a traveller for, and was refused, admission to the defenders' hotel, and so suffered a legal wrong. In my opinion, he may be held on one occasion to have made such an application and to have been refused.” He went on to deal with the facts and added: “ Accordingly, it seems to me that the pursuer did—apart from the question whether the defenders had good ground for refusing him—on this occasion suffer a legal wrong sounding in damages.”

(1) 1920 S. C. 829.

(2) Ibid. 830.

(3) Ibid. 834.

(4) Ibid. 837.

1944

CONSTANTINE
v.
IMPERIAL
HOTELS, LD.

Birkett J.

With the greatest desire loyally to follow authority which is binding on me, I find that I have yet to decide the express point in this case without any express authority to guide me. Having given the matter the fullest consideration, I hold this action by Mr. Constantine to be maintainable without proof of special damage. His right, I think, is founded on the common law. That right I found was violated. The law affords him a remedy, and the injury which he has suffered imports damage. I think that the principles of the decision in *Ashby* v. *White* (1) apply to this case. It only remains for me to say that I was urged by Sir Patrick Hastings to award exemplary or substantial damages, because of the circumstances in which the denial of the right took place when Mr. Constantine suffered, as I find that he did suffer, much unjustifiable humiliation and distress, but on the authorities I do not feel that I can accede to that submission, having regard to the exact nature of this action and the form in which it comes before me. My conclusion is that I must give judgment for Mr. Constantine for nominal damages only, and I, therefore, award him the sum of five guineas.

Judgment for plaintiff.

Solicitors for plaintiff: *Isadore Goldman & Son, for Sydney W. Price, Liverpool.*

Solicitors for defendants: *Durrant Cooper & Hambling.*

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(1) 2 Ld. Raym. 938; 3, Ld. Raym. 320; Smith's Leading Cases (13th ed.), vol. I, 253; Howell's State Trials, vol. XIV, 695.

C. G. M.

ATTORNEY-GENERAL *v.* RANDALL.

C. A.

1944
June 28; July 3, 13.

Scott and du Parcq L.JJ., Morton J.

Attachment—Arrest for debt—Capias ad satisfaciendum—Right of Crown to arrest—Debtors Act, 1869 (32 & 33 *Vict., c.* 62), *s.* 4.

The Crown is not bound by the provisions of the Debtors Act, 1869, as it is not mentioned in the Act, either expressly or by necessary implication, and, therefore, a debtor can be arrested under a writ of capias ad satisfaciendum to enforce payment of a debt due to the Crown.

Decision of Macnaghten J. [1944] W. N. 165 affirmed.

APPEAL from a decision of Macnaghten J. (1).

On April 21, 1944, the Attorney-General, on behalf of the Crown, recovered judgment against the applicant, Lawrence Randall, for the sum of 3,500*l.*, being arrears of purchase tax due to the Crown. On April 27, 1944, a writ of capias ad satisfaciendum was issued at the instance of the Solicitor of Customs and Excise. On May 4, 1944, the applicant was arrested and taken to Brixton Prison, where he was confined. On May 17, 1944, the applicant issued a summons in the action *Attorney-General* v. *Randall* asking for an order that the writ of capias be discharged and that the applicant be forthwith discharged from custody. This application came before Macnaghten J. on May 26 when he dismissed it. From that decision the applicant appealed.

Raeburn for the applicant.

Valentine Holmes for the Crown.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

July 13. The judgment of the court was read by

MORTON J. Mr. Holmes took the preliminary objection before Macnaghten J. and before this court that the proceeding by summons was not open to the applicant and that his proper course was to apply to the Divisional Court for a writ of habeas corpus. Macnaghten J. did not deal with this preliminary objection, but dismissed the application on its merits. This court decided to hear the appeal on its merits and then to deal with the preliminary objection if this proved to be necessary. In the result, we are satisfied that the appeal should be dismissed, and we have not formed any view whether the preliminary objection is or is not well-founded.

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(1) [1944] W. N. 165.

The only question argued before us on this appeal was whether or not the Debtors Act, 1869, binds the Crown. That Act abolished imprisonment for debt, with certain exceptions. It is conceded by counsel for the applicant that, if that Act does not bind the Crown, the appeal must fail.

The present point came before Willes J. in 1870 in *Attorney-General* v. *Edmunds* (1). That was an application on the part of one Edmunds calling on the Crown to shew cause why he should not be discharged out of custody. Judgment had been obtained against him on an information in the Exchequer by the Attorney-General to recover the amount awarded to be paid to Her Majesty by two arbitrators, to whom it had been referred to take the accounts between Edmunds and the Treasury. Counsel for Edmunds contended that he was entitled to be discharged on the ground that the Crown was bound by the Debtors Act, 1869. Willes J. reserved judgment for two days and his judgment is reported as follows: "On the main question he had taken time to "consider the point raised, not because he had any doubt "on the general principle as to the right of the Crown, but "whether the case might come within any exception to the "general rule. His opinion was, that the case did not come "within the Act of Parliament abolishing imprisonment for "debt. The general principle was that the Crown was not "affected except by express enactment, or by necessary "implication. There were no express words in the statute, "and no necessary implication as to Crown debts. And, in "reference to the Bankruptcy Act, it seemed that the Crown "was to preserve the remedy it possessed, and not to be "defeated. There were certain exceptions pointed out, and "all he wished to consider was whether there was any exception "to interfere with the general principle he had mentioned, "whether the Crown was bound by any exception, or whether, "in fact, the change made was universal. There were "exceptions as to cases of breach of trust, and there must be "debts due to the Crown arising therefrom, but that was not "the point before him in this case. The question was whether "there was any universal change, so as to absorb and "extinguish the Crown of its general prerogative. There "was no express enactment or necessary implication bringing "the case within any exception, and therefore he must refuse "to make an order for the discharge of Mr. Edmunds."

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(1) (1870) 22 L. T. 667.

So far as we are aware, the decision in *Attorney-General* v. *Edmunds* (1) has never been questioned during the 74 years which have elapsed since it was reported. Moreover in *In re Smith* (2) it was admitted in argument, and accepted by Lord Coleridge C.J. and Pollock B., that the Act of 1869 did not bind the Crown. The argument and the judgments were directed entirely to the question whether the debt under consideration was or was not a debt due to the Crown. Further, it would appear that the point now before us may have been considered in 1876 by the House of Lords, for in the report of the same case in the Law Journal Reports (3) there appears the following passage : " On appealing from a judgment of the " Court of Chancery to the House of Lords, Smith, the " appellant, had entered into the usual recognizance, required " by the Standing Order No. 61 of the House, to secure " payment of costs. He thereby ' acknowledged himself to " ' owe to our Sovereign Lady the Queen the sum of 400*l.*' " the condition being that on payment of costs to the " respondent in case the decree appealed from should not be " reversed, then the recognizance to be void. The appeal was " heard and dismissed with costs. The appellant failed to pay " the costs of the respondents who, thereupon, applied to the " House of Lords for his committal for contempt. The House, " having regard to the provisions of the Debtors Act (32 & 33 " Vict., c. 62) and to the case of *Attorney-General* v. *Edmunds* (1) " refused to commit." We thought it right to have inquiry made whether the House of Lords did consider and pronounce on the point, but inquiry threw no further light on the matter. We are, therefore, content to assume, in favour of the applicant that the House of Lords did not decide the point now before us.

Mr. Raeburn, for the applicant, submitted that *Attorney-General* v. *Edmunds* (1) was wrongly decided. He contended that there were certain limitations or qualifications on the general principle stated by Willes J. and that Willes J. stated that principle in terms which were too wide in their application. We do not accept this contention. In our view, the general principle was correctly stated by Willes J., and that principle has been recognized and applied in a number of cases which were conveniently summarized by Wrottesley J., in *Attorney-General* v. *Hancock* (4). We entirely agree with that learned

(1) 22 L. T. 667.
(2) (1876) 2 Ex. D. 47.
(3) 46 L. J. (Q. B.) 73.
(4) [1940] 1 K. B. 427.

judge's conclusion stated as follows (1): " The rule is now well " laid down and clear that if an Act of Parliament would " otherwise devest the Crown of its property, rights, interests " or prerogative, it is not to be construed as applying to the " Crown unless the Crown is mentioned either expressly or by " necessary implication." Mr. Raeburn's second argument was that there are words in the Act of 1869 which show by necessary implication that the Crown was to be bound thereby. He relied in particular on the opening words of s. 4 of the Act : " With the exceptions hereinafter mentioned, no person shall, " after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money. " There shall be excepted from the operation of the above " enactment. (1.) Default in payment of a penalty, or sum " in the nature of a penalty, other than a penalty in respect " of any contract." Counsel's reasoning may be summarized as follows :—This exception can only apply to a penalty, or sum in the nature of a penalty, due to the Crown. The Crown must be bound by the Act, otherwise the exception would be unnecessary. The short answer is that the exception would equally well apply to a penalty, or sum in the nature of a penalty, due to a subject. For instance, if a common informer recovered judgment for a penalty imposed by a statute, and default were made in payment of such penalty, such default would clearly come within the exception. Counsel contended that such default would be default in payment of a judgment debt and not default in payment of a penalty, but we decline to take so narrow a view of the construction of the exception. The Crown is not mentioned expressly in the Act, and we are satisfied that the Crown is not mentioned by necessary implication. It is, perhaps, of some significance that, although amendments have been made to the Debtors Act, 1869, the legislature has never thought fit to amend the Act by providing that the Crown shall be bound thereby. This fact indicates that the view taken by Willes J. a year after the Act was passed gave effect to the intention of the legislature. The result is that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for applicant : *Titmuss, Sainer & Webb.*
Solicitor for Crown : *Solicitor of Customs and Excise.*

R. F. S.

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(1) [1940] 1 K. B. 427, 439.

REX *v.* DUNCAN AND OTHERS.

C. C. A.

1944
June 8, 9, 10.

Viscount Caldecote C.J., Oliver and Birkett JJ.

Criminal law—Witchcraft—" Conjuration "—Witchcraft Act, 1735 (9 *Geo.* 2, *c.* 5), *s.* 4*—Evidence—Demonstration by " medium " of materialization of spirits—Rejection—Discretion of judge.*

" Any kind of . . . . conjuration " in s. 4 of the Witchcraft Act, 1735, does not refer exclusively to the calling up of evil spirits. Therefore, it is an offence under the words of that section " pretend " to exercise . . . . any kind of . . . . conjuration," to pretend to call up the spirits of deceased persons to appear to or communicate with living persons.

The appellant, a spiritualist " medium " offered to give a demonstration of her powers at the trial under the usual conditions observed during such demonstrations :—

Held, that the judge, in rejecting this evidence, had exercised his discretion rightly.

Appeal against conviction.

The appellants, Victoria Helen Duncan, Frances Brown, Ernest Edward Hartland Homer, and Elizabeth Ann Jones, were convicted before the Recorder of London, at the Central Criminal Court on March 31, 1944, on a charge that they " conspired together and with other persons unknown to " pretend to exercise or use a kind of conjuration, to wit, " that through the agency of the said Helen Duncan spirits " of deceased persons should appear to be present in fact in " such place as the said Helen Duncan then was in, and that " the said spirits were communicating with living persons " then and there present," in contravention of s. 4 of the Witchcraft Act, 1735 (1). Duncan was a professional spiritualist " medium " engaged at a substantial fee to give a series of seances in a " temple " maintained by Homer over his chemist's shop. Jones, known as Mrs. Homer, lived with Homer. Brown assisted Duncan and acted as her booking agent. On January 14 and 19, 1944, Duncan, in a dim light at seances, produced her " spirit guide," Albert, and stated that he had a message for a person present who was seated in a particular chair and that a form would appear of someone

(1) Witchcraft Act, 1735 (9 Geo. 2, c. 5) s. 4 : " And for the more " effectual preventing and punishing any pretences to such arts or " powers . . . . whereby ignorant " persons are frequently deluded " and defrauded . . . . if any person shall . . . . pretend to exercise or use any kind of witchcraft, sorcery, inchantment, or " conjuration " he shall be liable to penalties.

who claimed to be a friend or relative of that person. In some cases the form which " materialized " was that of a bird or animal, such as a parrot or cat. Evidence was given which satisfied the jury that the phenomena were produced by fraudulent devices. The jury convicted the appellants, who appealed.

Loseby and *Pedler* for the appellants. The recorder misdirected the jury in telling them that to call up the spirits of deceased persons was a " conjuration " within s. 4 of the Witchcraft Act, 1735. The relevant statutes on the subject up to that time, except 33 Hen. 8, c. 8, speak only of evil spirits, namely, 5 Eliz. c. 16, and 1 Jac. 1, c. 12. The statute of Henry 8, it is true, only speaks of " conjuration of spirits," but that Act was repealed by 1 Edw. 6, c. 12, and Coke's Institutes, 1809, pt. III, c. 6, p. 45, speaks of " conjuration " of any evil and wicked spirit," Blackstone's Commentaries, 8th ed., bk. IV, p. 60, refers only to evil spirits, and Hawkins' Pleas of the Crown, 8th ed., vol. I, bk. 1, c. 26, p. 356, has " such as shall use any . . . . conjuration of any evil spirit." In Dalton's Country Justice (1635 ed.), p. 279, it is stated that " Conjurers . . . . have personal conference with the devill, " or evill spirit." In the old dictionaries—Cowel's (1727), Chambers' (1741), and Bailey's (1755), and in Byrne's Dictionary of English Law (1923), " evil " is never omitted before " spirits," and three of these appeared after the passing of the Act of 1735. That being in law the meaning of " conjuration " at the date of the passing of the Act of 1735, that statute, in using the word " conjuration," must be assumed, in the absence of clear words to the contrary, to have intended it to bear its recognized meaning. In rejecting the evidence of a demonstration by the appellant, Duncan, the recorder wrongly exercised his discretion. The result might have been conclusive in the appellant's favour. [Ewen's " Witch hunting and witch trials " was also referred to.]

Maude K.C. and *Elam* for the Crown. The Witchcraft Act, 1735, for the first time since the Act of 33 Hen. 8, omits the word " evil " before spirits, and speaks of " any kind of " conjuration." That must have been deliberate. It may be that up to that date conjuration did have the meaning contended for by the appellants, and the omission from the Act of the word " evil " which had hitherto always preceded " spirits " is significant. In the Oxford English Dictionary the definition of "conjuration" is the "invoking of spirits. "Effecting of something supernatural . . . . by the use of "some spell: *orig.* the compelling of spirits or demons . . . . "to appear." There the change in the meaning of "spirits" appears to be noted. The giving of a demonstration would have been impracticable at the trial under the conditions, e.g., the dimming of lights, imposed by the appellant for the purpose of such demonstration. The recorder had a discretion and he exercised it rightly.

Cur. adv. vult.

June 19. VISCOUNT CALDECOTE C.J. delivered the judgment of the court, in which he stated the facts and continued: Before dealing with the point which was regarded by counsel for the defence as his only point of law and as his most important ground of appeal, namely, the submission as to the meaning to be attributed in law to the term "conjuration" in the Witchcraft Act, 1735, I will deal with the submission that the learned recorder wrongly rejected evidence by the appellant, Duncan, purporting to demonstrate and prove that at all material times she was a materialization medium and to disprove the allegations made against her. In the course of the argument in this court the learned counsel for the appellants conceded that it was a matter for the discretion of the learned recorder whether to allow such a demonstration to be given or not. The difficulty of arranging such a demonstration satisfactory in all its detail to both sides is obvious. To mention only one matter, if, in the course of the demonstration, ectoplasm was to be alleged to emanate from the medium, would the jury be allowed to handle it or to do anything to verify the appearance? Or would the jury have to be content with what they could see in a dim light such as was provided on the occasions in question? A host of similar difficulties can be seen both from the point of view of the prosecution and of the defence. It seems clear to us that no such demonstration, even if the circumstances in which it should take place could be agreed, and whatever it purported to show, could be conclusive on the only issue which the jury had to try, and, indeed, might well confuse the jury or operate to the great disadvantage of the appellants. We think the learned recorder exercised his discretion wisely in this case, and we may add that he was fortified in what he did by the answer of the jury to the question he asked them whether they wished to see such a demonstration. No reasonable ground of complaint can be sustained on this point.

There remains for consideration the point that there was no evidence of any acts by the appellants constituting an offence under the Witchcraft Act, 1735, and that the learned recorder wrongly directed the jury that a pretence to hold conversation with spirits of deceased persons constituted an offence under that Act. The argument was that the proper direction would have been to tell the jury that only a pretence to hold conversation with wicked and evil spirits was forbidden by s. 4 of the Act of 1735. In the course of an interesting and elaborate argument, Mr. Loseby cited the authorities who had written on the word " conjuration " before 1735, and quoted from some of the dictionaries published after 1735.

The conspiracy of which the appellants were found guilty was a conspiracy to contravene s. 4 of the Witchcraft Act, 1735, and the material words in count 1 of the indictment were : " To pretend to exercise or use a kind of conjuration, " to wit, that through the agency of the said Helen Duncan " spirits of deceased persons should appear to be present in " fact in such place as the said Helen Duncan then was in, " and that the said spirits were communicating with living " persons then and there present." " Pretend to exercise " or use any kind of . . . . conjuration " are the words of s. 4 of the Act of 1735, and it is important to look at the history of this matter. I may begin with 33 Henry 8, c. 8, which uses the words " conjuration of spirits " with no reference to evil spirits at all. That Act was repealed by a statute of Edward 6, which, in turn, was followed by the statute 5, Eliz. c. 16. This last statute, before speaking of the repeal of 33 Henry 8, c. 8, by 1 Edward 6, c. 12, speaks of " the wicked offences of conjurations and invocations of evil " spirits " which were made felonies by the statute of Henry, whereas the words " evil spirits " do not occur in the statute of Henry 8 at all. That statute merely speaks of the practice of " invocations and conjurations of spirits." The next statute dealing with this matter was 1 Jac. I, c. 12, which in s. 2 speaks of the " conjuration of any evil and wicked spirit." The statute was a characteristic example of the attitude of James I to this practice. Finally, the Witchcraft Act, 1735, s. 4, after repealing the statute of James I speaks of " conjuration " without reference to spirits, or evil and wicked spirits, but simply " any kind of . . . . conjuration."

The point submitted by Mr. Loseby is that the word " conjuration " in the Act of 1735 has only one meaning, and that meaning has been well defined and crystallized in law. He says it bears the meaning in the language of Cowel's Interpreter (a publication of 1672) as contained in the following passage: "It is especially used for such as have personal "conference with the Devil or evil spirits." He cited from the third part of Coke's Institutes, Hawkin's "Pleas of the "Crown," and many dictionaries, but the definition I have quoted contains the main point of his submission. We must be allowed to doubt whether Cowel's Interpreter possesses the authority claimed for it by Mr. Loseby, and we certainly do not think that this meaning or interpretation is to be given to the words "any kind of conjuration" in the Act of 1735. Indeed, the express alteration from the statute of James I, which is being repealed, and the use of the words "any kind "of conjuration" without reference to spirits, evil or otherwise, would seem to indicate the contrary. In the sixteenth and seventeenth centuries the word "conjuration" was commonly used with reference to traffic with spirits. In those centuries the minds of men were greatly concerned with the evils which they believed arose from such conference, and as a result of the teaching of the Church, based possibly on passages in the Bible, all such spirits were regarded as, and were apt to be described as, evil spirits. Conjuration of these evil spirits was an offence, it was said, against God and religion and was usually linked with witchcraft, enchantment, invocation and sorcery, the punishment for which, as for heresy, was burning in early times. But "conjuration" was not a word which was to be taken to mean only "conjuration of evil and "wicked spirits." That was an express meaning given to it by the inclusion of the words in the statutes where such words appear. The Oxford English Dictionary gives examples of its use in different ages right down to modern times. Coke's Institutes, third part, ch. 6, associates the word "conjuration" with "invocation" and seems to suggest that the two words have the same meaning. The learned author quotes the case of King Saul from the First Book of Chronicles, c. x, vv. 13, 14: "So Saul died for his transgression . . . . and also for asking "counsel of one that had a familiar spirit to inquire of it; and "inquired not of the Lord."

We do not think that the words "any kind of conjuration" in the Witchcraft Act, 1735, can be limited in the way Mr. Loseby suggests. In the first place, it is to be observed that the offence described in the statute is the pretence to exercise or use "any kind of conjuration." Secondly, it appears plain that with the abolition of the felonies of witchcraft, sorcery, enchantment or conjuration the minds of men were making an advance. These things were no longer believed in, but the Act of 1735 did not go the length of allowing anyone to make the pretence of engaging in converse with spirits, not being evil spirits. Such a distinction would raise an issue of fact incapable of determination. In our judgment, the words of the section with which we are concerned in this case are all-important. What was aimed at, as shown by the language of the statute itself, was that ignorant persons should not be deluded or defrauded by the pretence to exercise or use any kind of conjuration. The reference to "evil spirits" is omitted, and the words "any kind of" were added, and, in our opinion, these words are wide enough to cover the conspiracy alleged. It was repeatedly emphasized at the trial by the recorder, and must be emphasized here again, that the only matter for the jury was whether there was a pretence or not. The prosecution did not seek to prove that spirits of deceased persons could not be called forth or materialized or embodied in a particular form. Their task was much more limited and prosaic. It was to prove, if they could, that the appellants had been guilty of conspiring to pretend that they could do these things, and, therefore, of conspiring to pretend that they could exercise a kind of conjuration to do these things. That was the case for the prosecution, and the jury must be taken to have accepted the evidence for the prosecution when they found the appellants guilty. We think all these appeals against conviction should be dismissed.

Appeals dismissed.

Solicitor for appellants: *G. A. Elkin.*
Solicitor for Crown: *Director of Public Prosecutions.*

W. L. L. B.

1944
June 6, 7, 8:
July 28.

YOUNG *v.* BRISTOL AEROPLANE COMPANY, LIMITED.

Court of Appeal—Obligation to follow previous decisions.

The Court of Appeal is bound to follow its own decisions and those of courts of co-ordinate jurisdiction, and the "full" court is in the same position in this respect as a division of the court consisting of

C. A.

1944

YOUNG
v.
BRISTOL
AEROPLANE
Co., LD.

Lord Greene M.R., Scott, MacKinnon, Luxmoore, Goddard and du Parcq L.JJ.

three members. The only exceptions to this rule are :—(1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2.) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords; (3.) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, e.g., where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court.

APPEAL from Laski K.C. sitting as commissioner at Lancaster assizes.

The plaintiff, who was employed at the defendants' workshops, received injury in an accident arising out of and in the course of his employment and received compensation under the Workmen's Compensation Acts. He then sought to obtain damages in respect of the same accident, alleging that the defendants, in breach of their statutory duty, had failed to fence one of their machines which he was using. In their defence, the defendants pleaded: " In the further alternative " the defendants say that the plaintiff before the commencement of this action claimed and received compensation under " the Workmen's Compensation Acts in respect of [the accident]. " The plaintiff is thereby barred from recovering damages in " respect of the said accident." This plea was based on s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925. On the authority of a decision of the Court of Appeal in *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1), the commissioner gave effect to the plea in favour of the defendants. The plaintiff appealed.

Paull K.C. and *Henry Barton* for the plaintiff. No doubt *Selwood* v. *Townley Coal & Fireclay Co., Ld.* (2), and *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1), in which the Court of Appeal held that acceptance of compensation known to be such under the Workmen's Compensation Act, 1925, precludes an action for damages, are against the plaintiff, but, if this court is of opinion that those cases were wrongly decided, it has power to come to another conclusion: see *Wynne-Finch* v. *Chaytor* (3), where the Court of Appeal not only refused to follow its own decision in *Daglish* v. *Barton* (4), but also purported to overrule it. *Perkins*' case (1) and *Selwood's* case (2) are inconsistent

(1) [1940] 1 K. B. 56.
(2) [1940] 1 K. B. 180.
(3) [1903] 2 Ch. 475, 485.
(4) [1900] 1 Q. B. 284.

C. A.
1944

Young v. Bristol Aeroplane Co., Ld.

with *Kinneil Cannel and Coking Coal Co.* v. *Sneddon* (1) in the House of Lords, and are, therefore, not binding on this court. There is no statutory or common law obligation on the court to follow its own decisions. Where courts have done so, it was by virtue of custom or "comity among judges": per Brett M.R. in *The Vera Cruz* (*No.* 2) (2). In any case, the matter is different where the court which has to consider previous decisions is the full Court of Appeal, for such a court is entitled to consider whether or not it will follow the decision of a smaller number of judges: per Lord Esher M.R. in *Kelly & Co.* v. *Kellond* (3). The House of Lords follows its own decisions because they are the final tribunal: see *London Street Tramways Co.* v. *London County Council* (4), but that is not the case with the Court of Appeal. At any rate, it is a matter of discretion. [*Hart* v. *Riversdale Mill Co.* (5) was also referred to.]

Lynskey K.C. and *Matabele Davies* for the defendants. The Court of Appeal is bound by its own decisions. In *Velasquez, Ld.* v. *Inland Revenue Commissioners* (6), Cozens-Hardy M.R. said: "But there is one rule by which, of course, "we are bound to abide—that when there has been a decision "of this court upon a question of principle it is not right for "this court, whatever its own views may be, to depart from "that decision. There would otherwise be no finality in the "law." That is the principle which this court is invited to adopt. No doubt, a decision of a Court of Appeal the members of which are equally divided is not binding on a subsequent court, and the same is true where there are inconsistent decisions of the Court of Appeal when the subsequent court can follow its own opinion. *London Street Tramways Co.* v. *London County Council* (4) where the House of Lords held itself bound by its own decisions is really conclusive of this case. If the appellant is right an intermediate court between the Court of Appeal and the House of Lords would exist.

Cur. adv. vult.

July 28. Lord Greene M.R. read the judgment of the court in which he stated the facts and continued: After a very careful review of the facts, the learned commissioner arrived

(1) [1931] A. C. 575.
(2) (1884) 9 P. D. 96, 98.
(3) (1888) 20 Q. B. D. 569, 572.
(4) [1898] A. C. 375, 380.
(5) [1928] 1 K. B. 176.
(6) [1914] 3 K. B. 458, 461.

at the following conclusions: (1.) That the plaintiff did not make a claim for compensation (namely, compensation under the Workmen's Compensation Act) " as such "; (2.) that the plaintiff could not be said to have exercised the option given to him by s. 29, sub-s. 1, of the Act, since he did not know of " his " right to elect"; (3.) that "the plaintiff received the payments " made to him as compensation under the Workmen's Compensa- " tion Act," and that "the payments were paid to him as such." We see no reason to differ from any of these conclusions. The learned commissioner, having come to these conclusions, considered himself bound by the authority of judgments of this court, in particular those in *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1), and *Selwood* v. *Townley Coal & Fireclay Co.* (2), to hold that the third of his findings was fatal to the plaintiff's claim. In so holding, we are of opinion that he was clearly right. *Perkins*' case (1) differed from the present case in that there the workman had claimed compensation, but in *Selwood's* case (2) there had been no claim and no exercise by the workman of his option. The court in *Selwood's case* (2) regarded this distinction as immaterial so far as concerned what was referred to as "the second limb" of the sub-section, that is to say, the sentence which begins with the words " but the " employer shall not be liable " : see specially the judgment of Slesser L.J. (3). It is manifest from all the judgments in *Selwood's* case (2) that, in the view of the court, the decision which was then arrived at followed logically and inevitably from the ratio decidendi in *Perkins*' case (1). As a result of these two decisions, therefore, it must be regarded as having been decided by this court that a workman who has been paid compensation under the Act, which he has knowingly accepted as such compensation, is thereby precluded from recovering damages from his employers at common law.

We were reminded by counsel for the plaintiff that in *Unsworth* v. *Elder Dempster Lines, Ld.* (4), one part of the reasoning on which the decision in *Perkins*' case (1) had been based was criticized and doubted: see per MacKinnon L.J. (4) and per Goddard L.J. (5). That criticism in no way affects the validity of the decision in *Perkins*' case (1), since, as both MacKinnon and Goddard L.JJ. pointed out, those passages in the judgments which they regarded as open to doubt were not necessary to the decision and are to be regarded as obiter dicta. Mr. Paull, for the plaintiff, while frankly conceding that the decisions to which we have referred made his task in this court difficult, and, perhaps, impossible, suggested that they might be treated as inconsistent with the decision of the House of Lords in *Kinneil Cannel & Coking Coal Co.* v. *Sneddon* (1), and for that reason ought not to be followed. It is a conclusive answer to this submission that *Kinneil's* case (1) was cited to this court in *Perkins'* case (2). Mr. Paull's argument, therefore, involves a submission that in *Perkins'* case (2) this court, with the relevant authorities before it, came to a wrong decision. We will, however, add that we are of opinion that there is no inconsistency between the decision of the House of Lords and those of this court. The House of Lords in the *Kinneil* case (1) was dealing with the right of a widow to claim damages at common law on behalf of her children and herself in respect of an accident which had already been the foundation of a successful claim for compensation under the Workmen's Compensation Act by another dependant. It was held that the claims of the widow and children at common law could not be defeated by the act of somebody to whom the common law remedy was not open. The House of Lords said nothing contrary to the view that the second limb of the sub-section precluded a workman from claiming damages after receiving compensation under the Act. Of this second limb Lord Buckmaster said (3): "The "latter provision is intended to relate only to cases where the "proceedings are taken by the same persons and affects only "the cases where the workman proceeding under the statute "had the option of proceeding either under the statute or at "common law." For these reasons we are clearly of opinion that the present case is covered by the earlier decisions of this court.

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(1) [1940] 1 K. B. 56.
(2) Ibid. 180.
(3) Ibid. 184–6.
(4) Ibid. 658, 670.
(5) Ibid. 673.

Our attention was called to the opinion expressed by Lord Patrick in a case heard by him in the Court of Session in Scotland on December 10, 1943: *Brown* v. *William Hamilton & Co., Ld.* (4). In that opinion Lord Patrick referred to *Perkins'* (2) and *Selwood's* cases (5) and refused to follow them because he thought they were contrary to the current of decision in Scotland, to the true intent of the Workmen's Compensation Act, 1925, and to the proper construction of

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(1) [1931] A. C. 575.
(2) [1940] 1 K. B. 56.
(3) Ibid. 580.
(4) Unreported.
(5) [1940] 1 K. B. 180.

s. 29, sub-s. 1, of that Act. His criticism deserves the most careful consideration, but, even if we were inclined to accept it, we should not, by reason of it, be entitled to ignore the decisions in *Perkins'* (1) and *Selwood's* cases (2), which, for reasons which we now proceed to state, are, in our opinion, binding on us, and must, therefore, be followed.

We now turn to what is the more important question raised by this appeal. When it first came on for hearing before Lord Greene M.R., MacKinnon and Goddard L.JJ., Mr. Paull stated that, unless he could establish that *Perkins'* case (1) and *Selwood's* case (2) could not stand with the decision of the House of Lords in *Kinneil's* case (3), his only chance of succeeding lay in satisfying this court that those two cases were wrongly decided and that he wished to argue that this court was not bound to follow them. The question thus raised as to the jurisdiction of this court to refuse to follow decisions of its own was obviously one of great general importance and directions were given for the appeal to be argued before the full court. It is surprising that so fundamental a matter should at this date still remain in doubt. To anyone unacquainted with the rare cases in which it has been suggested or asserted that this court is not bound to follow its own decisions or those of a court of co-ordinate jurisdiction the question would, we think, appear to be beyond controversy. Cases in which this court has expressed its regret at finding itself bound by previous decisions of its own and has stated in the clearest terms that the only remedy of the unsuccessful party is to appeal to the House of Lords are within the recollection of all of us and numerous examples are to be found in the reports. When in such cases the matter has been carried to the House of Lords it has never, so far as we know, been suggested by the House that this view was wrong and that this court could itself have done justice by declining to follow a previous decision of its own which it considered to be erroneous. On the contrary, the House has, so far as we are aware, invariably assumed and in many cases expressly stated that this court was bound by its own previous decision to act as it did. The attitude both of this court and of the House of Lords is so well-known that citations are scarcely necessary, but we take three modern examples at random. The first is *Produce Brokers Co.* v. *Olympia Oil & Cake Co.* (4), in which Buckley L.J. began his

(1) [1940] 1 K. B. 56.
(2) Ibid. 180.
(3) [1931] A. C. 575.
(4) (1915) 21 Com. Cas. 320.

judgment as follows (1): "I am unable to adduce any reason "to show that the decision which I am about to pronounce is "right. On the contrary, if I were free to follow my own "opinion, my own powers of reasoning such as they are, I "should say that it is wrong. But I am bound by authority— "which, of course, it is my duty to follow—and, following "authority, I feel bound to pronounce the judgment which I "am about to deliver" (2). Phillimore L.J. and Pickford L.J. similarly expressed themselves to be bound by previous decisions of this court with which they did not agree. The decision was reversed by the House of Lords (3). The second example is *Velasquez, Ld.* v. *Inland Revenue Commissioners* (4) where this court held itself bound by a previous decision of its own which, it considered, had not been overruled by an intervening decision of the House of Lords. Lord Cozens-Hardy M.R., said (5): "But there is one rule by which, of "course, we are bound to abide—that when there has been a "decision of this court upon a question of principle it is not "right for this court, whatever its own views may be, to depart "from that decision. There would otherwise be no finality "in the law. If it is contended that the decision is wrong, "then the proper course is to go to the ultimate tribunal, the "House of Lords, who have power to settle the law and hold "that the decision which is binding upon us is not good law." The correctness of the decision in *Velasquez's* case (4) was impugned in *English Scottish & Australian Bank, Ld.* v. *Inland Revenue Commissioners* (6). This court had held that it was bound to follow *Velasquez's* case (4), and in the House of Lords Lord Buckmaster said (7) that it was right in so holding. In the result, the appeal was allowed and *Velasquez's* case (4) overruled. This was a strong case since, even before the question was set at rest by the House of Lords, *Velasquez's* case (4) was generally regarded as having been wrongly decided. The third example is the very recent one of *Perrin* v. *Morgan* (8). There this court held itself bound by previous decisions to give a narrow construction to the word "money" in a will. In the House of Lords Viscount Simon L.C., said (9) that this court " could take no other course than follow and apply the " rule of construction by which, owing to previous decisions " of courts of co-ordinate jurisdiction, it was bound." It is true that in this and similar cases the court which held itself to be bound by previous decisions consisted of three members only, but we can find no warrant for the argument that what is conveniently but inaccurately called the full court has any greater power in this respect than a division of the court consisting of three members only.

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(1) (1915) 21 Com. Cas. 322.

(2) The authority was *In re North Western Rubber Co.* and *Huttenbach* [1908] 2 K. B. 907 in the Court of Appeal.

(3) [1916] 1 A.C. 314; 21 Com. Cas. 331.

(4) [1914] 3 K. B. 458.

(5) Ibid. 461.

(6) [1932] A. C. 238.

(7) Ibid. 242.

(8) [1943] A. C. 399.

(9) Ibid. 405.

The Court of Appeal is a creature of statute and its powers are statutory. It is one court though it usually sits in two or three divisions. Each division has co-ordinate jurisdiction, but the full court has no greater powers or jurisdiction than any division of the court. Its jurisdiction is mainly appellate, but it has some original jurisdiction. To some extent its decisions are final (for example, in appeals in bankruptcy and from the county courts), but in the majority of cases there is an appeal from its decisions to the House of Lords either with the leave of the Court of Appeal or of the House of Lords. Neither in the statute itself nor (save in two cases mentioned hereafter) in decided cases is there any suggestion that the powers of the Court of Appeal sitting with six or nine or more members are greater than those which it possesses when sitting as a division with three members. In this respect, although we are unable to agree with certain views expressed by Greer L.J. (1) as will presently appear, we think that he was right in saying that what can be done by a full court can equally well be done by a division of the court. The corollary of this is, we think, clearly true, namely, that what cannot be done by a division of the court cannot be done by the full court.

In considering the question whether or not this court is bound by its previous decisions and those of courts of co-ordinate jurisdiction, it is necessary to distinguish four classes of case. The first is that with which we are now concerned, namely, cases where this court finds itself confronted with one or more decisions of its own or of a court of co-ordinate jurisdiction which cover the question before it and there is no conflicting decision of this court or of a court of co-ordinate jurisdiction. The second is where there is such a conflicting decision. The third is where this court comes to the conclusion that a previous decision, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords. The fourth (a

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(1) *In re Shoesmith* [1938] 2 K. B. 637, 644.

C. A.

1944

YOUNG
v.
BRISTOL
AEROPLANE
CO., LD.

special case) is where this court comes to the conclusion that a previous decision was given per incuriam. In the second and third classes of case it is beyond question that the previous decision is open to examination. In the second class, the court is unquestionably entitled to choose between the two conflicting decisions. In the third class of case the court is merely giving effect to what it considers to have been a decision of the House of Lords by which it is bound. The fourth class requires more detailed examination and we will refer to it again later in this judgment.

For the moment it is the first class which we have to consider. Although the language both of decision and of dictum as well as the constant practice of the court appears to us clearly to negative the suggested power, there are to be found dicta, and, indeed, decisions, the other way. So far as dicta are concerned, we are, of course, not bound to follow them. In the case of decisions we are entitled to choose between those which assert and those which deny the existence of the power. In recent times the question was discussed obiter in *Newsholme Bros.* v. *Road Transport & General Insurance Co.* (1). In that case Scrutton L.J. said (2): " The decision of the Court of " Appeal on fact is not binding on any other court, except as " between the same parties. When the decision is that from " certain facts certain legal consequences follow, the decision is, " I think, binding on the Court of Appeal in any case raising " substantially similar facts," but Greer L.J. in the same case said (3): " I should like to point out this fact, that [this court] " has, at least on two occasions, sitting as a full court, differed " from a previous decision by the same court: and it seems to " me that if that is right, it is equally right to say that, sitting " with a quorum of three judges, it has exactly the same power " as if it were sitting with six judges, though it would only be " in most exceptional cases that those powers would be exercised." In *In re Shoesmith* (4), Greer L.J. said: " I wish to " repeat what I said in the course of the argument, that the " court has more than once, sitting as a court with all its six " members, decided that it can overrule a decision of the Court " of Appeal which has held the field for a number of years. " If the Court of Appeal, sitting with its six members, can do so, " equally a court sitting with a quorum of members can do the " same thing." It is noteworthy that the substantial question

(1) [1929] 2 K. B. 356.

(2) Ibid. 375.

(3) Ibid. 384.

(4) [1938] 2 K. B. 637, 644.

in *Newsholme Bros.* v. *Road Transport & General Insurance Co.* (1) was, not whether the Court of Appeal had jurisdiction to overrule a previous decision, but how it should exercise its choice between apparently irreconcilable decisions given by it previously. The two decisions mentioned by Greer L.J. in the passage first quoted are *Kelly & Co.* v. *Kellond* (2), and *Wynne-Finch* v. *Chaytor* (3). In the former case Lord Esher said (4): "This court is one composed of six members, and "if at any time a decision of a lesser number is called in "question, and a difficulty arises about the accuracy of it, "I think this court is entitled, sitting as a full court, to decide "whether we will follow or not the decision arrived at by the "smaller number." This dictum of Lord Esher was not assented to by Fry L.J. who said (5): "As to the power of this "court when sitting as a full court to overrule the decision of a "court consisting of a smaller number, I do not think it is "necessary to give an opinion." It is not very clear what view was taken by Lopes L.J., the other member of the court. He said (6): "I do not desire to express an opinion as to what "is the power of a full Court of Appeal in respect of a decision "of three of their number, but I understand that the full court "was called together in *Ex parte Stanford* (7), to consider the "question arising in that case, and to revise and reconsider any "decision touching the point in that case which had been pre-"viously laid down." Lower down on the page he is reported as having said that, if the earlier decision decided what was contended for, it was overruled by the later decision, a view which seems inconsistent with what he said in the passage quoted. It is to be observed that the question in *Kelly & Co.* v. *Kellond* (2) also was not whether a particular decision should be overruled, but which of two inconsistent decisions should be followed. The two decisions in question were *Roberts* v. *Roberts* (8) and *Ex parte Stanford* (7), the latter being a decision of the full Court of Appeal, and the court followed *Ex parte Stanford* (7). Although the decision in *Roberts* v. *Roberts* (8) was cited during the hearing of *Ex parte Stanford* (7) by the full court the decision was not commented on or even referred to in the judgment. It appears to have been open to the court in *Kelly & Co.* v. *Kellond* (2) to choose between the two decisions but, of course, in such circumstances the decision of the full court would be likely to carry greater weight than that of a division of the court. In *Wynne-Finch* v. *Chaytor* (1) the decision was on a point of practice, the question being whether an application ought to have been made to the Chancery Division to set aside a judgment directed to be entered by an official referee to whom the whole action had been referred, or whether the proper procedure was by way of appeal to the Court of Appeal. The question was directed to be argued before the full court. Reference was made to *Daglish* v. *Barton* (2) where Stirling L.J., who delivered the judgment of the court, said (3): "With the greatest respect, we are unable "to agree with *Daglish* v. *Barton* (2), and think that it ought "not to be followed; and it is, therefore, overruled." It may be that the true explanation of this decision is that the court came to the conclusion that the decision in *Daglish* v. *Barton* (2) was manifestly incorrect and contrary to the plain words of the statute. Nevertheless, the case is, we think, an authority in favour of the proposition that the court has power to overrule its previous decisions. Certainly it cannot be said that there is any statutory right of appeal from a decision of the Court of Appeal to the full court, although on occasions where there has been a conflict caused by the existence of inconsistent earlier decisions the court has ordered the case to be argued before a full court. Apart from a recent case which falls under the fourth class referred to above, we only know of one other case in which the Court of Appeal appears to have exercised the suggested power. That was *Mills* v. *Jennings* (4). It is to be noted that the earlier authority which the court refused to follow was a decision, not of the Court of Appeal, but of the old Court of Appeal in Chancery. Indeed, this fact was given as the justification of the view which the Court of Appeal then took. Cotton L.J. in delivering the judgment of the court, said (5): "We think that we are at liberty to reconsider and review the "decision in that case as if it were being re-heard in the old "Court of Appeal in Chancery, as was not uncommon."

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(1) [1929] 2 K. B. 356.
(2) 20 Q. B. D. 569.
(3) [1903] 2 Ch. 475.
(4) 20 Q. B. D. 572.
(5) Ibid. 574.
(6) Ibid. 575.
(7) (1886) 17 Q. B. D. 259.
(8) (1884) 13 Q. B. D. 794.

It remains to consider the quite recent case of *Lancaster Motor Co.* (*London*) v. *Bremith, Ld.* (6), in which a court consisting of the present Master of the Rolls, Clauson L.J. and Goddard L.J., declined to follow an earlier decision of a court consisting of Slesser L.J. and Romer L.J. (1). This was clearly a case where the earlier decision was given per incuriam. It depended on the true meaning (which in the later decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the court was apparently not referred and which it obviously had not in mind. The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts. Two classes of decisions per incuriam fall outside the scope of our inquiry, namely, those where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it —in such a case a subsequent court must decide which of the two decisions it ought to follow; and those where it has acted in ignorance of a decision of the House of Lords which covers the point—in such a case a subsequent court is bound by the decision of the House of Lords.

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(1) [1903] 2 Ch. 475.
(2) [1900] 1 Q. B. 284.
(3) [1903] 2 Ch. 485.
(4) (1880) 13 Ch. D. 639.
(5) Ibid. 648.
(6) [1941] 1 K. B. 675.

On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize: (1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2.) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords.

(1) In *Gerard* v. *Worth of Paris Ld.* [1936] 2 All E. R. 905.

C. A.
1944

YOUNG
v.
BRISTOL
AEROPLANE
Co., LD.

(3.) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.

I should perhaps add, speaking for myself individually, with regard to the observations in *Unsworth's* case (1) mentioned in this judgment, that I have carefully considered my own observations there mentioned in *Perkins'* case (2) and I have come to the conclusion that the criticism of them in *Unsworth's* case (1) is justified, and that what I said was wrong. What I said there formed no part of the ratio decidendi, as will appear from a reading of the judgment, and does not affect its validity for that reason.

Appeal dismissed.

Solicitor for plaintiff: *W. H. Thompson.*

Solicitors for defendants: *Gregory, Rowcliffe & Co., for John Taylor & Co., Manchester.*

(1) [1940] 1 K. B. 658. (2) [1940] 1 K. B. 56.

W. L. L. B.

C. A.
1944
June 23.

Lord Greene M.R.
MacKinnon and Luxmoore L.JJ.

CAPITAL AND COUNTIES PROPERTIES, LIMITED *v.* BUTLER.

Landlord and tenant—Rent restriction—Conditions of statutory tenancy—Terms of original tenancy—Contractual rent less than standard rent—Right of landlord to claim standard rent during statutory tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 1.

A dwelling-house to which the Rent Restriction Acts applied was let to a monthly tenant at a rent of 95*l.* a year during the continuance of hostilities and thereafter at 114*l.* a year. The standard rent was 120*l.* While hostilities were still continuing, the landlord served notice on the tenant determining the tenancy and giving him the option of continuing at the standard rent. The tenant claimed that, by virtue of s. 15, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the term of the tenancy agreement fixing the rent at a figure below the standard rent was imported into the statutory tenancy:—

Held, that, as the clause fixing the rent at 95*l.* during the continuance of hostilities and thereafter at 114*l.* was a mere reddendum and not a term by which the landlord agreed to accept a temporary reduction of a larger rent named in the reddendum, it was not imported into the statutory tenancy, and the landlord was entitled to claim the standard rent.

Phillips v. *Copping* [1935] 1 K. B. 15 applied.

Bryanston Property Co., Ld. v. *Edwards* (ante, p. 32) distinguished.

APPEAL from Brentford county court.

By a tenancy agreement, dated August 6, 1940, the plaintiffs, Capital and Counties Properties, Ld., let to the defendant, Butler, a dwelling-house at 37 Prince's Gardens, West Acton, for one year at a rent of 95*l.* Clause 5 of the agreement provided that, if the tenant wished to do so, he might remain in possession after the first year as a monthly tenant at a rent at the rate of 95*l.* a year during the continuance of hostilities and thereafter of 114*l.* a year. The standard rent of the dwelling-house was 120*l.* a year. On April 7, 1943, the plaintiffs served notice to determine the tenancy together with a "notice of "increase of rent" to 120*l.*, and a covering letter informing the tenant that he could, if he so desired, remain in possession on paying the standard rent from June 1, 1943. The tenant claimed that by virtue of s. 15, sub-s. 1, of the Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (1), the term of the tenancy agreement fixing the rent at 95*l.* during the continuance of hostilities and 114*l.* thereafter was imported into the statutory tenancy. In an action, by the plaintiffs, for rent at the standard rate of 120*l.* the county court judge held that he was bound by *Bryanston Property Co., Ld.* v. *Edwards* (2) to decide in favour of the defendant, and the plaintiffs appealed.

M. Turner-Samuels for the plaintiffs. The landlord is entitled to the standard rent after giving due notice to quit, although the rent under the tenancy agreement was lower and the agreement provided for that rent "during the continuance "of hostilities." This case is distinguishable from *Bryanston Property Co., Ld.* v. *Edwards* (2) because cl. 5 here is not a deduction clause, but a reddendum. It would not be consistent with the provisions of the Act to deprive the landlord of his right to the standard rent by regarding this as a term imported into the statutory tenancy under s. 15, sub-s. 1.

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(1) By s. 15, sub-s. 1, of the Increase of Rent & Mortgage Interest (Restrictions) Act, 1920: "A "tenant who by virtue of the "provisions of this Act retains "possession of any dwelling-house "to which this Act applies shall, "so long as he retains possession, "observe and be entitled to the "benefit of all the terms and conditions of the original contract of "tenancy, so far as the same are "consistent with the provisions "of this Act . . . ."

(2) Ante, p. 32.

C. A.

1944

Capital and Counties Properties, Ld. v. Butler.

Platts Mills for the defendant. I rely on s. 15, sub-s. 1. Clause 5 is "a term of the original contract" within the meaning of that sub-section. This case is covered by *Bryanston Property Co., Ld.* v. *Edwards* (1), not by *Phillips* v. *Copping* (2). Clause 5, fixing the rent at 95*l.* during the continuance of hostilities, implies a covenant by the landlord not to ask for further rent during that period.

Lord Greene M.R. The county court judge, on the authority of *Bryanston Property Co., Ld.* v. *Edwards* (1) held that the provisions of cl. 5 were imported into the statutory tenancy. In *Bryanston Property Co., Ld.* v. *Edwards* (1), this court had to consider the effect of its earlier decision in *Phillips* v. *Copping* (2). In the latter case the rent payable under the contractual tenancy was 47*l.* 10*s.* for the first three years and 55*l.* for the second three years, the standard rent being 65*l.* The question arose whether the reddendum clause of the lease was imported into the statutory tenancy by virtue of s. 15, sub-s. 1, of the Act of 1920. This court held that the reddendum clause was not consistent with the provisions of the Act establishing a standard rent, and that it was, therefore, not imported into the statutory tenancy. The real question in the present case is whether it is governed by *Phillips* v. *Copping* (2) or by *Bryanston Property Co., Ld.* v. *Edwards* (1). which was a case of a very special kind. The rent named in the reddendum was 275*l.*, which this court held was the standard rent, but there was a special provision in the tenancy agreement that during the war the landlord would allow the tenant to deduct 85*l.*, and we held that that special provision was a term of the contract imported into the statutory tenancy by s. 15, sub-s. 1.

All that the court can do is to endeavour to apply the Act to the circumstances of each case. In *Bryanston Property Co., Ld.* v. *Edwards* (1), we did not intend to cast doubt on the principle, laid down by *Phillips* v. *Copping* (2), that where the contractual rent is less than the standard rent the landlord is entitled, after determining the contractual tenancy, to demand the standard rent during the statutory tenancy. The present case clearly falls within the principle of *Phillips* v. *Copping* (2). The agreement provides for a rent of 95*l.* during the continuance of hostilities and 114*l.* thereafter. All that that means is that,

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(1) Ante, p. 32.

(2) [1935] 1 K. B. 15.

C. A.

1944

CAPITAL AND COUNTIES PROPERTIES, LD. *v.* BUTLER.

if the tenancy continues during the period of hostilities, the rent shall be 95*l*. If it continues longer, it shall become 114*l*. The fact that the first period is of uncertain duration does not make this clause any the less a reddendum. It is pure reddendum and nothing else. Mr. Platts Mills argued that the clause implied a covenant by the landlord not to ask for further rent. I cannot follow that argument. The case is clearly covered by *Phillips* v. *Copping* (1) and the appeal should be allowed.

MACKINNON L.J. I agree.

LUXMOORE L.J. I agree.

Appeal allowed.

Solicitors for plaintiffs: *Kerly, Sons & Karuth.*
Solicitors for defendant: *S. Seifert & Co.*

(1) [1935] 1 K. B. 15.

J. W. H.

EDITOR'S NOTE: A case falling on the other side of the line, a note of which follows, came before the Court of Appeal on July 6, 1944.

OXLEY *v.* REGIONAL PROPERTIES, LIMITED.

Landlord and tenant—Rent restriction—Conditions of statutory tenancy—Terms of original tenancy—Proviso for reduction of rent on punctual payment—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 1.

APPEAL from Willesden county court.

On January 30, 1941, the plaintiff became tenant of premises under a tenancy agreement for three months from October 28, 1940. The standard rent of the premises was 90*l*. a year, which was also the rent payable under the agreement. The rent was payable in advance by monthly payments of 7*l*. 10*s*. It was provided in the agreement that: "the landlord shall credit the tenant's account with an additional sum "of 16*s*. 8*d*. upon the tenant paying to the landlord the sum of "6*l*. 13*s*. 4*d*. within fourteen days of the day on which any monthly "payment of rent ought to be made to the landlord in accordance with "the provisions herein contained." On February 27, 1943, the landlord of the premises served the plaintiff with a notice saying that the annual rent of the premises would, as from March 28, 1943, be 92*l*. 1*s*. 6*d*., being made up as to 90*l*. of the standard rent and as to 2*l*. 1*s*. 6*d*. of an addition in respect of an increase in rates. On the expiration of that notice the tenancy became a statutory tenancy, and the plaintiff claimed that the proviso as to reduction of rent on punctual payment should be

C. A.
1944

CAPITAL AND COUNTIES PROPERTIES, LD. *v.* BUTLER.

imported into the statutory tenancy. The county court judge decided in favour of the tenant and the landlords appealed.

Lynskey K.C. and *Seuffert* for the defendants.
Graham Brooks for the plaintiff.

THE COURT (LORD GREENE M.R., MACKINNON and LUXMOORE L.JJ.) dismissed the appeal. The case came within *Bryanston Property Co., Ld.* v. *Edwards*, ante p. 32. It was not a question of importing the reddendum out of the contractual tenancy into the statutory tenancy as it was in *Capital and Counties Properties Co., Ld.* v. *Butler* (ante p. 730). The proviso was a separate and independent term of the tenancy by which the tenant could get a bonus on punctual payment. It might be thought that the distinction between the two classes of case represented by *Bryanston Property Co., Ld.* v. *Edwards* (supra), on the one hand, and *Phillips* v. *Copping* [1935] 1 K. B. 15, on the other, was rather fine and depended on technicalities of language, but when statutes like the Rent Restrictions Acts came to be applied to the highly technical and variegated relationship of landlord and tenant it was almost inevitable that fine distinctions would be found to prevail.

Appeal dismissed.

Solicitors for landlords: *Hyman Isaacs, Lewis & Mills.*
Solicitor for tenant: *F. E. Clifford.*

(Reported by F. R. R. BURFORD, Esq., Barrister-at-Law).

C. A.

WINCHESTER COURT, LIMITED *v.* MILLER.

1944
May 18, 19;
June 27.

Scott, MacKinnon and Luxmoore L.JJ.

Landlord and tenant—Rent restriction—Permitted increase in rent—Transfer to landlord of burden previously borne by tenant—Subsequent tenancy on easier terms than earlier tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 3.

In 1936 landlords let a dwelling house, which subsequently became a "1939 Act house," to P. on a lease for seven years at a rent of 195*l.* per annum, which contained a full repairing covenant by P. In April, 1941, this lease was surrendered and the landlords on May 12, 1941, let the dwelling house to M. on a quarterly tenancy at the rent of 160*l.* per annum by an agreement which contained an undertaking by M. to do repairs, fair wear and tear excepted, a less onerous obligation than that undertaken by P. This agreement was terminated and on March 25, 1942, the landlords again let the premises to M. on the same terms, except that the rent was increased to 165*l.* per annum. On November 9, 1942, the landlords by statutory notice under s. 1, of the Rent Restrictions (Notice of Increase Act), 1923, raised the rent to the standard rent of 195*l.* as from February 15, 1943. On August 11, 1943, the landlords gave M. notice to quit on November 15, 1943, and on August 31, 1943, they served a notice under the Rent Restrictions Act, stating that the rent of the dwelling-house as from November 15, 1943, would be the standard rent plus 1*l.* 10*s.* 8*d.* permitted increase for rates and 20*l.* "cost of repairs for which the former tenant was "liable." M. having refused to pay the 20*l.*, the landlords sued her in the county court:—

Held (1.) that "a transfer to a landlord of any burden or liability "previously borne by the tenant" within s. 2, sub-s. 3, of the Rent and Mortgage Interest (Restrictions) Act, 1920, is not confined to a transfer to a landlord of a burden by the tenant who himself bore it immediately before the increase of rent but includes the transfer of a burden borne by the tenant, a demise to whom fixed the standard rent: (2.) by Scott and MacKinnon L.JJ., that an increase in rent in respect of that transfer could lawfully be demanded from a statutory tenant without any agreement by the tenant to pay it and consequently the landlords were entitled to recover the 20*l.* from M.: by Luxmoore L.J. contra, that such increase of rent could only be effected consensually: that the rent of 160*l.* had been consensually fixed on the basis of the transfer to the landlord of the liability previously borne by the tenant by the agreement of May 12, 1942, by which agreement the transfer had been made: that there was no transfer of liability by the agreement of March 25, 1942, and there was no ground for exacting any additional rent beyond the standard rent of 195*l.* when the latter agreement was signed and the landlords were not entitled to recover the 20*l.* from M.

APPEAL from West London county court.

A flat, No. 10, Winchester Court, was let by the landlords, Winchester Court Ld., to the tenant, Mrs. Miller, by a tenancy agreement, dated May 12, 1941, at a yearly rent of 160*l.* By it the tenant undertook to keep the premises in repair, fair wear and tear excepted. The flat was within the provisions of the Act of 1939, the standard rent being fixed in accordance with the provisions of the Acts at 195*l.* This was the rent reserved under a lease, dated December 25, 1936, granted to one Platini, which was the last letting of the flat before September 1, 1939. By this lease Platini covenanted to keep the flat in repair, but as there was no exception of fair wear and tear, Platini's covenant was more onerous from the tenant's point of view and more favourable from the landlord's than the obligation to repair undertaken by the tenant in the agreement of May 12, 1941. The difference in value of the two obligations was agreed to be 20*l.* per annum. Subsequently this agreement was terminated and a new one was entered into by the landlords and the tenant on March 25, 1942, at an increased

C. A.

1944

Winchester Court, Ld. *v.* Miller.

rent of 165*l*. The second agreement also contained an undertaking to repair, with an exception of fair wear and tear. On November 9, 1942, the landlords duly served on the tenant a statutory notice under the Rent Restrictions Acts purporting to raise the rent of the flat as from February 15, 1943, from 165*l*. to 195*l*., the standard rent of the premises. This notice operated under s. 1 of the Rent Restriction (Notices) Act, 1923, as a notice to quit. Subsequently the rates on the flat were increased, and in June, 1943, the landlords became entitled to demand an increase of 1*l*. 10*s*. 8*d*. under the provisions s. 2 (1.) (*b*) of the Act of 1920, and accordingly, on June 30, 1943, they served on the tenant a further statutory notice claiming that the rent of the flat would as from August 1, 1943, be 196*l*. 10*s*. 8*d*. On August 11, 1943, the landlords gave the tenant notice to quit under the second agreement. This notice expired on November 15, 1943, and was effective to put an end to the contractual tenancy constituted by the second agreement. At the same time the landlord's agents wrote to the tenant a letter the material parts of which were as follows: " You will appreciate that you are entitled to continue at the " standard rent which is 195*l*. per annum, plus any increase in " rates which has occurred since the date by reference to which " the standard rent is fixed, subject to similar conditions of " tenancy to those existing under the lease which created the " standard rent." The lease referred to was that granted to Platini. The letter set out a copy of the repairing covenant in that lease and continued: " We are therefore writing to say " that our clients will be prepared on the expiration of your " current tenancy to grant you a lease for a period of one " year and thereafter three monthly at the standard rent " plus increased rates as above, such lease to contain the " foregoing repairing covenant on the part of the tenant or " alternatively, if you desire to continue on the basis of having " no liability for internal repairs and redecorations, then the " rent will be increased by 20*l*. per annum to 215*l*. per annum, " plus increased rates as above, being the estimated annual " cost of the repairs and redecorations for which the landlord " will be liable, being an obligation for which the tenant was " liable under the lease creating the standard rent."

On August 31, 1943, the landlords served a notice under the Rent Restriction Act stating that the rent of the flat would, as from November, 15 1943, be 216*l*. 10*s*. 8*d*. per annum, made up as follows (*a*) Standard rent of premises 195*l*. per annum ; (*b*) Cost of repairs for which former tenant was liable 20*l*. per annum ; (*c*) Increase of rates payable by the landlord 1*l*. 10*s*. 8*d*. The tenant admitted her liability to pay the standard rent of 195*l*. plus the 1*l*. 10*s*. 8*d*. in respect of increased rates borne by the landlord, but refused to pay any part of the 20*l*. claimed in respect of the repairing covenant, and the landlords sued her in the county court for arrears of rent and a declaration that they were entitled to increase the rent in respect of the transfer by 20*l*., or some other sum, or, in the alternative, that the tenant was liable to perform the covenants contained in the lease to Platini. The county court judge held that, to be within the terms of the sub-section, a transfer of burden from tenant to landlord must be one from the tenant who bore it immediately before the increase of rent. He therefore gave judgment for the tenant and the landlords appealed.

Comyns Carr K.C. and *Safford* for the landlords. The decision of the county court judge in the latter part of s. 2, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1), was wrong. The fact that the letting on the termination of which the landlords claimed to be entitled to increase the rent was to a different tenant from the tenant at the date of the tenancy which fixed the standard rent is immaterial. The words " landlord " and " tenant " in the sub-section refer, not to specific persons, but to the persons for the time being in the position of landlord and tenant respectively. When, therefore, the landlords had shown that the tenant at the time of the fixing of the standard rent was under a liability to repair under full repairing covenants and that they subsequently let to the present tenant with a fair wear and tear clause, they had established that there had been a transfer to them of a burden " previously borne by the " tenant," within the meaning of sub-s. 3. The difference in value between the two sets of repairing covenants was 20*l*. a year, and the terms on which the flat will be held, if that sum is paid, will be " on the whole not less favourable "

(1) By Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2, sub-s. 3 : " . . . . " any increase of rent in respect " of any transfer to a landlord of " any burden or liability pre- " viously borne by the tenant " where, as the result of such " transfer, the terms on which any " dwelling-house is held are on " the whole not less favourable to " the tenant than the previous " terms, shall be deemed not to " be an increase of rent for the " purposes of this Act . . . ."

to the tenant " than the previous terms " within the meaning of the sub-section. In such a case the sub-section provides that such an increase of rent shall not be deemed to be an increase of rent for the purposes of the Act, and, therefore, there is nothing to render it irrecoverable.

Done for the tenant. Section 2, sub-s. 3, of the Act of 1920 applies only to voluntary transfers of a burden or liability between landlord and tenant, which are effected by agreement. The sub-section gives no power to impose an addition to the rent in invitum. Permitted increases which may be so imposed are set out in s. 2, sub-s. 1. The increase claimed in this case is not one of them. Where the conditions prescribed in sub-s. 3 are fulfilled, the resulting increase of rent is not a " permitted increase," but is to be deemed not to be an increase of rent within the prohibition of s. 1 of the Act. The statutory form of Notice of Increase of Rent makes no provision for an increase such as the landlords seek to impose. Further, four conditions prescribed by the second part of s. 2, sub-s. 3, have not been satisfied in this case. (*a*) There has been no transfer of a burden or liability previously borne by the tenant. " Previously borne " must mean " borne " immediately before the transfer." No other point of time is indicated in the sub-section. The only alternative meaning would be " borne at any time previously," but that would lead to an impossible position as there might have been several tenancies with different covenants. If the meaning intended were " borne at the date by reference to which the " standard rent is to be fixed," the sub-section would have used words to that effect. Such a construction would greatly reduce the scope of the sub-section, to the disadvantage of the landlords. The landlords contend that the transfer took place on May 12, 1941, when the flat was first let to the present tenant with the exception of fair wear and tear to her undertaking to repair. There was at that date no tenant of the premises from whom a transfer could take place. Platini had surrendered and the premises were unlet, and the present tenant was never under the liability in question, so there was no transfer from her. (*b*) If the alleged transfer took place on May 12, 1941, the increase of 20*l.* first claimed in August, 1943, is not an increase " in respect of " such transfer within the sub-section. There was a second tenancy agreement on March 25, 1942, and again no such increase was mooted. (*c*) There has been no transfer of a burden or liability to the landlords. The liability to repair contained in Platini's covenant was not replaced in whole or in part by an undertaking on the part of the landlords when they let to the present tenant. The Act imposes no statutory duty on the landlords to repair. The provision in s. 2, sub-s. 5, that "for the "purposes of this section . . . . the landlord shall be deemed "to be responsible for any repairs for which the tenant is "under no express liability" imposes no obligation to do repairs. It refers to the permitted increase in s. 2, sub-s. 1 (*d*), and in the case of 1939 houses is mere surplusage: see the views of Lord Hanworth M.R. and Atkin L.J. in *Morgan* v. *Liverpool Corporation* (1), followed by Goddard J. in *Wilchick* v. *Marks & Silverstone* (2). (*d*) It follows that the tenant's position will be worsened. She was, and still is, under a liability to repair, fair wear and tear excepted. As to repairs beyond that there was not and is not now any liability either on her or on the landlords. She will, therefore, pay an additional 20*l*. in rent and get nothing for it. Under s. 15, sub-s. 1, of the Act of 1920, the tenant, as statutory tenant, is entitled to the benefit of all the terms and conditions of the tenancy agreement dated March 25, 1942, including the exception of fair wear and tear in the repairing undertaking. The landlords cannot enlarge the scope of her repairing undertaking against her will, but they seek to charge her with an annual sum representing the increased cost of repairs which would fall on her if her repairing covenant did not contain the exception of fair wear and tear and so in effect deprive her of the benefit of that exception. Platini had a term of seven years whereas Mrs. Miller held under a quarterly tenancy. The repairing covenants appropriate to the former might be quite inappropriate to the latter. This is one illustration of the anomalies which would arise if a landlord were entitled to impose on his statutory tenant in the form of additional rent the obligations which were borne by some previous tenant who was in occupation at the date by reference to which the standard rent was fixed.

Comyns Carr K.C. in reply. There is a transfer of a burden from tenant to landlord if a tenant ceases to be liable for repairs since, if the landlord does not do the repairs, the property will lose value. The effect of s. 15, sub-s. 1, of the Act of 1920 is to preserve the terms of the existing lease but subject to the provisions of the Rent Restriction Acts as to

(1) [1927] 2 K. B. 139 and 147. (2) [1934] 2 K. B. 56.

rent: *Phillips* v. *Copping* (1). The object of s. 2, sub-s. 3, is to preserve the equilibrium as between the liabilities of landlord and tenant established by the legislative fixation of the standard rent of a dwelling-house. Standard rent attaches to the dwelling-house and not to any person. It is a right in rem. *Carter* v. *S. U. Carburetter Co.* (2).

Cur. adv. vult.

SCOTT L.J. The question of interpretation raised by this appeal is one of general importance, but, in my opinion, (1.) the words of sub-s. 3 of s. 2 of the Rent and Mortgage Interest (Restrictions) Act, 1920, are sufficient to cover Mr. Comyns Carr's interpretation; (2.) there is nothing in the sub-section or its context inconsistent with that interpretation; (3.) it is consonant with the broad policy of the legislation; and, finally, (4.) it is only if that is the right interpretation of that particular sub-section that we can find any provision whatever in the whole body of rent restriction legislation to give effect to what seems to me to be the primary principle which, from the outset of the legislation in 1915, must really have underlain the decision of Parliament to use the rental figure arrived at by the parties themselves, when at arm's length, namely, that the letting of the house in a *free* market, that is to say, one unrestricted by statutory limitation, can be used as the basic and permanent criterion of what can in fairness to the parties be treated as the "standard rent" of the house. From this point of view, the important considerations to bear in mind are, first, that the standard rent becomes under the legislation a permanent attribute of the house, one which (apart from "permitted increases") cannot be changed by the free contract of its present or future landlords or tenants; secondly, that to that extent the house acquires a defined status so that a decision of the courts fixing its standard rent is a judgment in rem binding on all the world within the jurisdiction of our courts.

The legal result is that within those limits the relationship of landlord and tenant of the house is taken out of the realm of contract and passes into that of status. If there be ambiguity in the sub-section—and no one can say that its language is as clear as it might be—it must be construed in the light of the governing principles embodied in the legislation. When Parliament adopted the protective policy of taking

(1) [1935] 1 K. B. 15.

(2) [1942] 2 K. B. 288.

rents out of the consensual control of the parties because external causes had made the supply of " dwelling-houses " fall short of the demand and thus caused undue economic hardships to fall on the tenant classes of the community, it must be presumed to have intended to do so without avoidable unfairness to landlords. That is, no doubt, why it chose as the criterion of its standard rent a rent fixed by the free bargaining of the parties, the proverbial economic " higgling " of the market " as it did by its definition of the standard rent in s. 2, sub-s. 1, of the Act of 1915, the first Rent Restriction Act. Whether it was the rent on August 3, 1914, or the rent at which it was last let before that date or, if it was first let after that date, the rent at which it was first let, it was equally one of which the attribute of probable fairness could be predicated. That Parliament did think that such a basis would probably be fair may be presumed, and the presumption is borne out by the fact that Parliament maintained the same basis in identical language in the 1920 Act and did it again in the 1939 Act to houses which theretofore had remained outside the Rent Restriction Acts.

When adopting that basis for the standard rent as fair to both parties, Parliament cannot have been blind to the other main incidents of the relationship of landlord and tenant. Every consensual rent is, in economic theory, the outcome of bargaining between the parties in the light of the respective advantages and burdens which the other intended terms of the contract will confer or impose respectively on each of them. When agreement is reached, the agreed rent may thus fairly be regarded as the money measure of the balance of those advantages and burdens for which the tenant is content to pay the agreed rent, and it is obvious that Parliament so regarded the problem, but, if that be true—and I think it is true—it is equally obvious that the equilibrium represented by that bargaining is susceptible of disturbance as time goes on, not only by a change in the amount of rent, but also by a " transfer of," or a change in, any one of the economic advantages and burdens on which, in the nicely adjusted and bargained balance, the fairness of the rent depended. It must be assumed that in 1920 Parliament was alive to the obvious fact that alterations in those basic advantages and burdens of the tenancy might easily make the fixed standard rent irremediably unfair unless the resultant change of balance could be redressed by a compensating money change. That, to my mind, must have been both the genesis and the object of s. 2, sub-s. 3, of the Act of 1920, and that characteristic need of some way of maintaining the fairness of the original balance, which seems to me inherent in the legislation, is, I think, a sufficient reason for so resolving any ambiguity there may be in the wording of the sub-section as to give it the meaning for which the landlords contend. And it is to be observed further that such a change in the balance of economic considerations underlying the rent may in the life history of the house occur at any time, not only as between the original tenant and the original landlord, but after either or both of them has or have ceased to be in any way concerned in the house. The house, on the other hand, has its permanent status with its permanent statutory rent (subject only to permitted increases), and, so far as the theory of the Act is concerned, goes on for ever though landlords and tenants come and go. Unless this interpretation of the sub-section is well-founded, the legislation must not infrequently lead to results which are permanently unfair, for it will contain no provision for ensuring that the standard rent shall retain its quality of fairness in relation to the agreed distribution of the other burdens of the tenancy agreement, a relationship on which the standard rent was obviously based by Parliament in 1915, and, however the sub-section ought to be construed, it is indubitable that the Acts were not intended to petrify the terms of the tenancy other than rent.

At first sight there was plausibility in the argument of Mr. Done that a change of tenant or a change in the terms of the original tenancy agreement occurring between the date of the original letting on which the statutory rent was based and the time when a claim is made under s. 2, sub-s. 3, in respect of a transfer of burden or liability must be treated as a contractual waiver of any pre-existing right conferred by the sub-section, but that reasoning involves, as I think, a fallacy. It ignores the fundamental element of the statutory disregard of freedom of contract and assumes a restoration of it for the purpose of over-riding the declaratory provisions of the sub-section. Those provisions fix the parties' rights just as much as the provisions permitting defined increases of the standard rent. I think the sub-section creates certain rights for redressing an unfair alteration of the equilibrium which underlies the legislative perpetuation of the standard rent. The language of the sub-section is pointedly free from limiting restrictions: "*Any* transfer to *a* tenant of *any* burden or "liability" shall be treated as an alteration of rent and the increase of burden is treated as a forbidden increase of the standard rent and made recoverable from the landlord. So, on the other hand, an increase of rent to counterbalance a transfer of burden from the tenant to the landlord is made recoverable from the tenant. The language of the sub-section which contains this statutory recognition of the fundamental principle of equilibrium ought, in my opinion, to be liberally construed so as to give effect to that principle, if its words permit that construction, and I think they do. For these reasons I would construe the word "transfer" as a synonym for "shifting" because the emphasis of the section is on the fact of a change in the equilibrium. It is the shifting of the burden that matters, not how or by whom it is brought about.

I have read my brother Luxmoore's draft judgment with care, but, in spite of his forceful argument, I am unable to construe sub-s. 3 as restricted to "consensual transfers" as he thinks. As he has himself pointed out, the quarterly notice given to the tenants in August, 1943, brought that tenancy to an end on the expiration of the notice, that effect resulting from the operation of the Rent Restrictions (Notices of Increase) Act, 1923. Had there been no tenant between the termination of the Platini tenancy in April, 1941, and the landlords' decision to re-let at any time after August 1, 1943, the landlords could then have said to any applicant: "The "standard rent is 196*l*. 10*s*. 8*d*.; but in regard to the repairing "covenant, upon the basis of which the rent, which became "in 1939 the standard rent, was originally fixed, I am going "to take over the fair wear and tear obligation, worth 20*l*. per "annum, myself, and you will have to pay the equivalent of "that in addition to the standard rent, as it is a 'transfer' "within s. 2, sub-s. 3." My brother Luxmoore says: "If that "proposing tenant agrees and takes a tenancy on that footing, "sub-s. 3 will prevent him coming to the court to complain "of the 20*l*. extra rent, but, if the landlord cannot find anyone "willing to agree to pay the extra money, the sub-section has "no operation." On the other hand, the consensual view of the sub-section in a case like the present renders the statutory notice to quit nugatory, for the existing tenant can ignore it, on the ground that the condition it seeks to impose of an added 20*l*., in order to restore the original equilibrium, is forbidden. Equally, if he submits to the notice to quit and leaves, a new tenant coming in has an equal right to ignore the condition, and in the result the original balance can never be restored. I confess the problem is difficult, but on the whole I think the appeal should be allowed.

I would only add that I do not think this action to recover the arrears of rent, which ex hypothesi are " deemed not to " be an increase of rent for the purposes of this Act," falls within the bar against appeals contained in sub-s. 6 of the same section. I am supported in that opinion by certain dicta of Scrutton L.J., and of Atkin L.J., in *Strickland* v. *Palmer* (1). I mention it as, had it been otherwise, it would have been the duty of this court of its own initiative to decline jurisdiction. The appeal should, I think, be allowed.

MACKINNON L.J. He must be a bold, if not a conceited, man who can feel confidence in forming, or expressing, an opinion on any one of the innumerable problems that arise out of what " may be cited together as the Rent and Mortgage " Interest Restrictions Acts, 1920 to 1939," but, having once more groped my way about that chaos of verbal darkness, I have come to the conclusion, with all becoming diffidence, that the county court judge was wrong in this case. My diffidence is increased by finding that my brother Luxmoore has groped his way to the contrary conclusion.

The county court judge has rejected the landlords' contention because of his view of the meaning of the words " a landlord," and " the tenant " in the relevant part of s. 2, sub-s. 3. He thinks these must refer to the parties to a particular demise and the variation of the terms of that demise whereby a burden is transferred, presumably by agreement, from tenant to landlord. I say " presumably by agreement," for, if the term of the demise is unexpired, there could be no such transfer except by the agreement of the tenant, and, if the demise has expired and the tenant is holding over as a statutory tenant, then by s. 15, sub-s. 1, of the Act of 1920 the statutory tenant is " entitled to the benefit of all the terms " and conditions of the original contract of tenancy " so that in that case also any such transfer of burden to the landlord could only be by the agreement of the tenant. In the result, on the judge's view, this part of s. 2, sub-s. 3, would have a very limited effect, namely, to prevent a tenant seeking to take advantage of the Act so as to relieve himself of the plain terms

(1) [1924] 2 K. B. 584, 586.

of an agreement he had voluntarily made. Similar considerations apply to the first half of s. 2, sub-s. 3, as to the transfer to a tenant of a burden or liability previously borne by the landlord. I cannot think that the sub-section was meant to have only this very limited effect. The increase of rent therein contemplated is not merely an increase of rent reserved by a particular demise, but also increase of rent above the standard rent. Therefore, "the tenant" who previously bore the burden must be, or include, the tenant, by a demise to whom the standard rent was fixed, and the "previous terms" must mean, or include, the terms of the previous tenancy which fixed the standard rent.

I think this view may be material in relation to another aspect of this legislation. By s. 12, sub-s. 1 (*a*), of the 1920 Act, as amended by the 1939 Act, the standard rent of what is called a 1939 house which is not let on September 1, 1939, is to be the rent at which it was last let before September 1, 1939. The judge is given no discretion to take into account the date, terms, or circumstances of that last letting. I have before now had occasion to point out that this unqualified provision may very possibly result in the gravest injustice. For example, if the last letting before September, 1939, was a century ago, when monetary values were utterly different, or if such last letting was by the then owner at a nominal rent to some aged relation, or if the last letting was at a very low rent in consideration of a covenant by the tenant to spend a large capital sum in repairing, modernising, or even enlarging, the dwelling, the judge would apparently have no power to take any of these factors into account. If the argument for the tenant in the present case is correct, there is yet another possible source of injustice and hardship. Suppose in October, 1939, A. lets a house to B. at 120*l.* a year, which, in fact, is a very moderate rent. B. pays what he has agreed to pay for seven quarters. Before the eighth quarter (bearing in mind the provision of s. 8, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923, as amended by the first schedule to the 1939 Act) B. applies to the county court judge under s. 11, sub-s. 1, of the Act of 1923 for a declaration that the standard rent of the house is 100*l.* and claims under s. 14, sub-s. 1, of the Act of 1920, as amended by the first schedule to the 1939 Act, to recover back 35*l.* of the total of the seven quarterly payments he has made pursuant to his contract. He supports both claims by alleging that he has discovered and can prove that before he signed the lease in October, 1939, the house was last let in 1889 for 100*l.* a year. A. says that he finds this was so, but he has been able to discover, and proves, that under the lease of 1889 the tenant was subject to a full repairing covenant, whereas by his lease to B. in 1939 he, A., is bound to do all the repairs and this burden means an expenditure of at least 20*l.* a year. If the argument of the tenant in the present case is correct, the judge will be reluctantly compelled to accede to both parts of B.'s iniquitous claim, but, in my view, s. 2, sub-s. 3, of the Act of 1920 will save the judge from that painful necessity. I think he can, and ought to, say that the words "the rent at which it was last let" in s. 12, sub-s. 1 (*a*), of the 1920 Act, as amended by the 1939 Act, involve a demise by a landlord to a tenant, and that such a landlord and tenant are within the contemplation of the provision as to "a landlord" and "the tenant" in the second half of s. 2, sub-s. 3, of the Act of 1920. When, therefore, in October, 1939, A. let the house to B. at 120*l.* a year, undertaking to do all the repairs, he was only doing what he was entitled to do, namely, charge him 100*l.*, the rent reserved by the 1889 demise with the addition of 20*l.* for the burden transferred to him, a landlord, from the tenant of 1889.

If, however, as I find my brother Luxmoore thinks, the tenant in this case is right, s. 2, sub-s. 3, of the Act of 1920 will hardly ever have any effect at all, and will never have any effect except to prevent a tenant from seeking to repudiate his own voluntary agreement. I think the landlords were right, and that their appeal should be allowed.

LUXMOORE L.J. The question raised by this appeal is new. It arises under the Rent Restriction Acts. It is: Can the standard rent of premises to which the Acts apply be increased to a tenant who elects to remain as statutory tenant after the tenancy has been determined by notice to quit by an amount equal to the difference between the value of an ordinary repairing covenant and one which contains an exception for fair wear and tear in a case where the standard rent was fixed by a lease containing an ordinary repairing covenant and the tenant electing to remain as statutory tenant was only liable under a covenant containing such an exception?

[HIS LORDSHIP stated the facts as above set out and continued]: The question in the appeal relates to the landlord's claim to include the 20*l*. per annum in the annual rental of the flat. It is admitted that the standard rent of the flat is 195*l*. and that by reason of the compliance by the landlords with the provisions of s. 2, sub-s. 1 (*b*), there has been an increase of 1*l*. 10*s*. 8*d*. over and above that rent. It is common ground that the tenant is entitled under the provisions of s. 15, sub-s. 1, of the Act of 1920, to remain as statutory tenant of the flat at the standard rent plus such increases as are permitted to the landlord. A perusal of that sub-section makes it clear that as statutory tenant the tenant, so long as she retains possession of the premises, must observe and is entitled to the benefit of all the terms and conditions of the lettings of March 25, 1942, so far as the same are consistent with the provisions of the Acts. In other words, she is bound to observe the modified undertaking for repairs contained in it and cannot be compelled to submit to more onerous terms.

The question, therefore, seems to resolve itself into one whether the 20*l*. claimed is a permitted increase of the standard rent or not. Section 2 of the Act of 1920 has a side note "Permitted increases in rent." The section is divided into a number of sub-sections. The first sub-section is as follows: "The amount by which the increased rent of a dwelling-house "to which this Act applies may exceed the standard rent "shall, subject to the provisions of this Act, be as follows," and then follow a number of paragraphs under the headings (*a*) to (*e*) inclusive. Paragraph (*a*) deals with expenditure made by the landlord on improvement or structural alteration of the dwelling-house (not including expenditure on decoration or repairs) since August 4, 1914, and in the case of 1939 houses there is an amendment by the Act of 1939 altering the date to September 2, 1939, and providing for other alterations. Paragraph (*b*) provides for increase of rent in cases where the amount payable by the landlord for rates has been increased. Paragraph (*c*) allows a comprehensive increase not exceeding fifteen per cent. of the net rent subject to a proviso. Paragraph (*d*) authorizes an increase in respect of repairs varying with the landlord's liability for the whole of such repairs or for part only thereof. Paragraph (*e*) provides increases in respect of dwelling-houses let by a railway company. Paragraphs (*c*), (*d*) and (*e*) do not apply to 1939 houses, but it is necessary to refer to them to arrive at a conclusion as to the meaning of the section. Sub-section 2 provides for the suspension of any increase under paras. (*c*)

C. A.
1944
WINCHESTER COURT, LD.
v.
MILLER.
Luxmoore L.J.

and (*d*) of sub-s. 1. It is under sub-s. 3 that the present question arises.

The increase of rent referred to in the second part of the sub-section is in respect of a transfer to a landlord of any burden or liability. There is no machinery for any transfer in invitum, and it would seem that the only method for bringing about such a transfer as is mentioned is consensual. I agree with the view expressed by my brother Scott that the terms " landlord " and " tenant " are not used in the sub-section to describe particular individuals already in contractual relationship, but are used generically. The burden of the repairing covenant undertaken by Platini was, by reason of the modified form entered into by the tenant, Mrs. Miller, in part transferred to the landlords by the letting of May 12, 1941, but the rent payable thereunder by the tenant was fixed contractually at 160*l.*, no doubt on the basis of that partial transfer, and there was no increase of rent to her over the 195*l.* which was then the standard rent of the flat. When she took the tenancy of March 25, 1942, the rent was increased to 165*l.*, but there was no transfer of burden or liability to the landlords because the burden or liability had already been transferred to them by the tenancy agreement of 1941. It is to be observed that in the case of any such transfer as is contemplated by this sub-section any addition to a tenant's rent by reason thereof is not described as a permitted increase of rent but is said " to be deemed not to be an increase of " rent for the purposes of this Act." Section 3 provides by sub-s. 2 for certain notices in writing to be given before any permitted increase of rent can become effective. These notices are to be in the form contained in sch. I to the Act or in a form substantially to the same effect. This form makes provision for all of the permitted increases referred to in paras. (*a*), (*b*), (*c*) and (*d*) of sub-s. 1 of s. 2, but makes no provision in respect of any claim for additional rent under sub-s. 3, and it is difficult to formulate how the notice ought to be framed if it is to provide for an increase in rent which is not for the purposes of the Act to be deemed to be an increase. The form of notice has been altered from time to time under the provisions of s. 14 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The forms now in force are to be found in sch. I to the Rent Restrictions Regulations, 1939. None of these forms provides for any increase or addition to rent in respect of anything arising under sub-s. 3 of s. 2. Apart from the absence of any provision for a transfer of burden or liability from tenant to landlord or vice versa there is no machinery in the Acts by which any addition to the standard rent can be made against a statutory tenant in respect of these matters. I am, therefore, of opinion that, on the true construction of the sub-section, any such addition to the rent in respect of the matters referred to in the sub-section can only result from agreement between the landlord and tenant and cannot be imposed on the tenant in the absence of such agreement. The sub-section is, of course, necessary to protect the landlord where rent is raised by agreement above the standard rent by reason of matters dealt with in it, and this seems to me to explain why in sub-s. 3 the additional rent allowed to be charged is not referred to as an increase of rent but is dealt with by providing that it is to be " deemed not to be an increase of rent for the purposes " of this Act."

I have, therefore, come to the conclusion that sub-s. 3 refers only to cases where there is a consensual transfer of liability and has no reference to and does not authorize any increase of rent to a statutory tenant where there is no consensual transfer. The landlords could properly have agreed with the tenant for payment of an additional rent beyond the 195*l*. when the tenancy agreement of May 12, 1941, was granted, because that agreement provided for a transfer to the landlords of part of the burden or liability in respect of repairs imposed on Platini by his lease, but the transfer to the landlords was then completed and there was no ground for exacting any additional rent beyond the 195*l*. when the second tenancy agreement of March 25, 1942, was signed.

For these reasons I am of opinion that the county court judge came to the right conclusion and that this appeal should fail. I naturally express my opinion with some diffidence as I find my brethren take a different view of the construction of the Act. I would, for the reasons I have expressed, dismiss the appeal with the usual consequences.

Appeal allowed.

Solicitors for landlords : *Stikeman & Co.*
Solicitors for tenant : *Linklaters & Paines.*

C. G. M.

C. A.

1944
May 22, 23; *June* 21

Scott and MacKinnon L.JJ., Morton J.

ADAMS AND ANOTHER *v.* NAYLOR.

Negligence—Trespasser—Liability of occupier of land.
Emergency legislation—War injury—Result of act done "in combating "the enemy"—Actual operation against enemy—Personal Injuries (Emergency Provisions) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 82), *s.* 8, *sub-s.* 1 (*a*).

In 1941 the military authorities entered into possession of, and laid a minefield on, certain sand dunes to which in peace time the public had had free access and which the children of the neighbourhood had been accustomed to use as a playground. The minefield was enclosed by a six-feet high barbed wire fence, notice boards giving warning of the danger from the mines being placed at intervals of about a hundred yards. The military authorities also took steps to ensure that the children attending the elementary schools in the vicinity should be warned of the risk attending intrusion into the enclosed area. In August, 1942, three boys who had been playing on the sands entered the minefield to recover a ball, and, one of them coming into contact with a mine, it exploded, with the result that the boy was killed and a second boy was injured. The boys entered the enclosure at a spot where high winds had caused the sand to silt up and form a hillock which covered all but the top strand of the barbed wire fence, and also buried an adjacent notice board. The parents of the killed and injured boys claimed from the army officer in control of the minefield at the time of the accident damages for negligence. For the defence it was contended, inter alia, that the boys were trespassers and also that the injuries sustained were "war injuries" within the meaning of ss. 3 and 8 of the Personal Injuries (Emergency Provisions) Act, 1939, so that the damages claimed were irrecoverable. Cassels J. found for the defendant and the plaintiffs appealed :—

Held (by MacKinnon L.J. and Morton J., Scott L.J. dissenting), that the appeal failed because the boys were trespassers on the land and neither the defendant nor those whom he represented had by their conduct tacitly permitted the boys to enter the minefield and so elevated them from the status of trespassers to that of licensees :—

Held, further (per Scott L.J. and Morton J.), that the words "combating the enemy" in the definition of "war injuries" in s. 8, sub-s. 1 (*a*), of the Act of 1939, were words of limitation and could only apply, so far as land operations were concerned, to a situation arising from the actual presence of the enemy on the soil of this country, and that, therefore, the defence based on s. 3, sub-s. 1, of the Act was not available to the defendant.

Per Scott L.J. Section 3, sub-s. 1, is independent of s. 1 and applies to relieve a defendant from paying damages even though the Minister of Pensions has not made a scheme under s. 1.

C. A.

1944

ADAMS
v.
NAYLOR.

APPEAL from Cassels J., at assizes.

Consolidated actions were brought by the mother of a boy named Frank Smith, aged 13, and by the father of a boy named Robert Adams, aged 11, as his next friend, claiming damages for the death of Smith and for injuries to Adams caused by the explosion of a mine in a minefield which, in 1941, had, with others along some miles of the coast, been laid by the military authorities on certain sand dunes. The defendant, Naylor, a captain in the Royal Engineers, was at all material times the officer in control of the minefield and he had been indicated by the War Office as the proper person to be made defendant. The plaintiffs alleged negligence on the part of the military authorities in failing to take sufficient steps to prevent the entry of children into the minefield. The evidence for the defence was that when the minefields were laid, a barbed wire fence, six feet high, was erected round them, and that at intervals of about one hundred yards notice boards of a conspicuous character were placed giving warning of the danger of entering the enclosure. In the case of this minefield the fence and notice boards were inspected at first every week, but afterwards intermittently, and there had been no inspection for some weeks before August 8, though sand had been blown up in March and more in July, 1942. Moreover, after accidents had occurred, the local education authorities, at the instance of the military, had taken steps to see that the children, especially those who were too young to understand the notices and who might climb through the wire, attending the elementary schools in the neighbourhood were warned that "where thick wire "fences were encountered, they should be left severely alone, "as there was the greatest danger in going anywhere near "them." It was not disputed that in normal times the public had free entry to the sand dunes in question, and that children had been accustomed to use them as playgrounds, and the Brigadier in charge admitted in evidence that the children "came in." On August 8, 1942, Frank Smith and Robert Adams, with another boy named Charles Adams, who had been playing on the sand dunes, entered the minefield to recover a ball which had rolled into the enclosure. In so doing Smith trod on something which caused a mine to explode, killing him and seriously injuring Robert Adams. The boys obtained entry at a spot where high winds had caused the sand to silt up and form a hillock about fifteen yards in width which had

C. A.
1944
ADAMS
v.
NAYLOR.

submerged all but the top strand of the barbed wire fence and had almost entirely buried an adjacent notice board so that none of the words of warning was visible. Cassels J. dismissed the actions on the ground that the injuries complained of were " war injuries " within s. 8, sub-s. 1 (*a*), of the Personal Injuries (Emergency Provisions) Act, 1939 (1), and, therefore, the damages claimed were irrecoverable : s. 3, sub-s. 1. He did not decide the question whether the boys were trespassers. The plaintiffs appealed.

Rose Heilbron for the plaintiffs. The boys were, not trespassers, but licensees. The minefield was not sufficiently protected. Between the minefield and the sandhills on which the boys were permitted to go there was at the place of entry no demarcation except one strand of barbed wire, and there was no notice prohibiting them from crossing that wire. Even if the boys were trespassers the War Department were not entitled to lay a minefield without taking the highest degree of care to prevent injury to a trespasser. The enclosure constituted an allurement to children who were permitted to play on the adjacent land. Children are in a different category from adults, and what may be a sufficient warning for adults is insufficient in the case of children. The Personal Injuries (Emergency Provisions) Act, 1939, does not apply to the facts of this case. Section 3 of that Act excludes from compensation at common law a person who receives a war injury, and " war injury " must be caused either by the

(1) Personal Injuries (Emergency Provisions) Act, 1939, s. 3, sub-s. 1 : " In respect of a war " injury sustained during the " period of the present emergency " by any person . . . . no such " compensation or damages shall " be payable, whether to the " person injured or to any other " person, as apart from the pro- " visions of this subsection (*a*) " would be payable under the " Workmen's Compensation Acts, " 1925 to 1938, or the Employers' " Liability Act, 1880, or any " corresponding enactment of the " Parliament of Northern Ireland ; " or (*b*) would, whether by any " enactment, by virtue of any " contract, or at common law, be " payable . . . . on the ground " that the injury in question was " attributable to some negligence, " nuisance or breach of duty for " which the person by whom the " compensation or damages would " be payable is responsible."

Section 8, sub-s. 1 (*a*) : " ' War " ' injuries ' means physical in- " juries caused by (i.) the discharge " of any missile . . . . or (ii.) the " use of any weapon, explosive or " other noxious thing ; or (iii.) the " doing of any other injurious act ; " either by the enemy or in com- " bating the enemy or in repelling " an imagined attack by the " enemy."

enemy or in combating an enemy attack. There must be either a real attack or an imagined attack: see s. 8, sub-s. 1 (*a*). The injury sustained in the present case was not caused by an enemy attack or in combating such an attack, but by precautionary or preparatory measures taken with a view to preventing a successful attack by the enemy. In the War Damage Act, 1941, the definition of "war damage" in s. 80, sub-s. (*c*), includes damage occurring as the direct result of any precautionary or preparatory measure taken with a view of preventing an attack by the enemy, but this provision was not included in the Personal Injuries (Emergency Provisions) Act, 1939. [She referred to *Hardy* v. *Central London Railway Co.* (1).; *Cooke* v. *Midland Great Western Railway of Ireland* (2); *Robert Addie & Sons (Collieries)* v. *Dumbreck* (3); *Ilott* v. *Wilkes* (4); and *Bird* v. *Holbrook* (5).]

Sir D. Maxwell Fyfe S.-G., *Lynskey K.C.*, and *H. I. Nelson* for the defendant. These boys were trespassers. There is evidence of prohibition of their entry in the barbed wire fence, the notice boards, and the instruction and warnings given in the local schools at the request of the military authorities. There is no evidence of toleration of entry. A fortiori there is no evidence of tacit acquiescence by the occupier in habitual trespass, such as would transform a trespasser into a licensee. It is not necessary to take effective steps to keep a trespasser out to prevent him from becoming a licensee. The rule as to trespass is fully and clearly set out in Salmond on Torts (9th edit.), p. 524 et seq. To a trespasser an occupier owes no duty to see that his premises are safe or to give warning of their danger, but he is probably liable for positive acts of negligent misfeasance done by himself with knowledge of the trespasser's presence. There must, however, be knowledge that the trespasser is on the land as distinct from knowledge that he may be on the land, and there must be a positive act of negligent misfeasance. The over-riding duty in laying a minefield in war-time is to secure the safety of the country and not to provide for the safety of the public. Even if these boys were licensees the military authorities have amply fulfilled their duty to give notice of the danger. They have taken the most practical steps to bring to the attention of children the danger of entering this

(1) [1920] 3 K. B. 459.
(2) [1909] A. C. 229.
(3) [1929] A. C. 358.
(4) (1820) 3 B. & Ald. 304.
(5) (1828) 4 Bing. 628.

C. A.

1944

Adams v. Naylor.

enclosure. There can be no question of allurement here. Natural features are not an allurement. These boys were merely following their ball. These actions are barred by the Personal Injuries (Emergency Provisions) Act, 1939, and the learned trial judge has so held. There are two ways of combating the enemy. One is to attack him, and the other is to prepare a trap for him in any place where he may come. The second method should, for the purposes of the Act, be placed in the same category as the first. [*Ponting* v. *Nokes* (1); *Smith* v. *Davey Paxman & Co.* (*Colchester*), *Ld.* (2); *Carlin* v. *Donaldson Atlantic Line, Ld.* and *M'Glory* v. *Donaldson Atlantic Line, Ld.* (3) were referred to.]

Cur. adv. vult.

June 21. The following judgments were read.

Scott L.J. This is an appeal from Cassels J. in a case where a boy was killed and another seriously injured by the explosion of a land mine on the coast. It is a border-line case, and for that reason is, in a legal sense, both difficult and, perhaps, important. [After stating in detail the facts above summarized his Lordship continued] I think that it is evident that the boys were quite ignorant of the fact that there was a minefield there: at the very spot that they were playing with their ball the gradual drifting of the wind-blown sand had raised the level of the ground to within twelve or fifteen inches of the top of the fence, completely covering all but the top wire. This stretch of higher ground level extended some fifteen yards north and south, and it was another twenty-five to thirty yards on the north and south of that fifteen yards before the sand hills descended enough to uncover the full height of the fence. By an unfortunate coincidence the warning board happened to have been fixed on the fence just in the fifteen yards stretch where nearly the whole fence was buried underground and invisible, with the result that nothing could be seen of the warning board, except a little triangle of a few inches at one corner, which contained no words at all and would mean nothing to children: and even if they had learnt by heart the warning that where thick wire fences are encountered they should be left severely alone, as there was the greatest danger in going near them, they might well have thought that there

(1) [1894] 2 Q. B. 281.
(2) [1943] 1 All E. R. 286.
(3) 1943 S. C. 172.

was no minefield at the spot where they entered it, because there was no thick wire fence there as had been described to them at school.

The knowledge of the military authorities that children were likely to frequent sandhills in the vicinity of the minefields was clearly sufficient on their own view to impose on them a moral duty towards such children, but the question is whether they had also a legal duty. I do not think that that issue should be expressed in the terms used in the United States of America and referred to by Scrutton L.J. in *Liddle* v. *Yorkshire* (*North Riding*) *C.C.* (1), as an antithesis between " the humanitarian view and the Draconian view." Such a metaphor is apt to beg the question of law.

There was discussion before us whether the military were in possession of the minefield pursuant to Defence Regulation 51, or had merely executed works under reg. 50, leaving possession in the person or body entitled in law to occupy the land, which in this case was either the district council or the golf club whose links included the sandhills where the minefield was constructed and to whom the military had in fact at some time been paying compensation as if under reg. 51. In my opinion, that question is irrelevant. The fact that the military had, without protest from anybody, surrounded the minefield with a fence, the purpose of which was the exclusion of the public, is sufficient to establish their actual possession, and actual possession is sufficient to entitle the possessor to the old writ of quare clausum fregit against any person entering who cannot prove a title to do so : see Holmes on the Common Law (1881), p. 244 : " Possession is of course sufficient for " trespass " ; where *Graham* v. *Peat* (2) is cited. I, therefore, approach the problem on the footing that, if the children had been adults, they would have been trespassers as from the moment when they crossed the line of the fence. Had they, in fact, been adults, it may be that the defendant would, apart altogether from contributory negligence, have had a good defence at common law. The only question, however, which we have to decide is whether he has one as against the children in the particular circumstances of this case.

The prominent feature in the facts is the sudden death-dealing character of the minefield, coupled with its situation in absolute juxtaposition to a place of public resort where

(1) [1934] 2 K. B. 101, at p. 110. (2) 1 East 244.

children were known to be likely to come for play. The division of plaintiffs in actions against occupiers of premises for damages for negligence into the three classes of invitees, licensees and trespassers, with the fundamental distinctions in the legal position of each class, is now part of our substantive law. It seems to predicate the possibility of drawing two absolutely rigid divisions between them. Viscount Dunedin in *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1) treated the three classes as divided one from the other by " an absolutely " rigid line," and he deprecated the use of the epithets in the phrases " bare licensees " and " pure trespassers," but in *Excelsior Wire Rope Co.* v. *Callan* (2), he added : " I think " that the word ' licensee ' . . . . is certainly intended to " include another class, if you so call it, which I may coin a " word to represent—namely, a permittee." In the latter case the defendants were held liable on the footing that they had permitted the children to trespass, if I may express my meaning paradoxically. That inference was drawn from the circumstances that children had often been seen by the defendants' servants near to the wheel which, when set in motion from a distance, was dangerous, and that no steps had been taken to keep them away. The circumstances of the present case are different from those of any decided case, and raise, I think, a new question of law. The material facts are, I think, these : (1.) that before the minefield was constructed the public had free access to the sandhills and children were accustomed to play there ; (2.) that after it was constructed the public, including children, continued to have access to the sandhills outside and immediately adjoining the area enclosed by the minefield fence ; (3.) that the danger of death for anyone, adult or child, who found his way into the minefield was extreme ; (4.) that because of this extreme danger it was necessary to erect high fences of strong wire to keep people out, and to inspect them regularly to ensure their maintenance in effective condition, with easily visible and legible warning boards at sufficiently short intervals ; (5.) that previous accidents had already happened to children, in consequence of which the military authorities had taken elaborate measures to have all children in the elementary schools of the district warned of the danger of the minefields and directed that the high fences of thick wire should be described to the children so that they should easily identify a minefield when they saw it ; (6.) that regular and frequent inspection was necessary to make sure that the fences did not get covered by drifting sand ; (7.) that at the place where eventually the accident did happen the fence was allowed by the military to get nearly covered up, and the warning board was allowed to get completely covered up so far as its warning function was concerned ; and, lastly (8.) that, although the silting up of the sand at the fatal spot had been observed in March, 1942, and was increasing in July, 1942, the military took no steps whatever to dig out the buried notice board or to raise the fence so as to make it apparent to anybody passing, and, particularly, to children at play, that the minefield was still there and that the fence was still intended to exclude the public.

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(1) [1929] A. C. 358, 371, 372. (2) [1930] A. C. 404, 411.

In those circumstances, when it is borne in mind that at the particular spot in question the children were lawfully where they were before the ball rolled down the hill under and past the one low wire into the minefield so that they were naturally tempted to run after it, and, further, that the military had failed to maintain the preventive character of the fence and were at least morally to blame for so failing and thus, to their knowledge, endangering the children, I cannot help thinking that the common law ought to treat such circumstances, taken together, as giving a cause of action for negligence in the case of children of such an age. It is to be noted that in *United Zinc Co.* v. *Britt* (1), Mr. Justice O. W. Holmes, delivering the judgment of the Supreme Court, pointed out that there was no evidence there of children being in the habit of going to the place where they were injured. I recognize that there was in the present case not the same kind of positive allurement as in *Cooke* v. *Midland Great Western Railway of Ireland* (2) in which Lord Collins said " A jury might infer not merely a licence but an invitation," but the whole of these sandhills had been before the military took possession and so continued to be a children's playground, to which they were free to resort, and the fact that the boundary fence had at the critical position been allowed to pass almost into oblivion, with only a remnant of old wire remaining visible, does seem to me, when considered in relation to the appalling danger from the neglected but still explosive minefield, to put on the military a positive duty owed to the children, to keep them out and prevent their trespassing, or,

(1) (1921) 258 U. S. 268, 276.

(2) [1909] A. C. 229, 241.

alternatively, to justify the inference that the military were so indifferent whether the old fence would or would not keep children out that they must be treated in law as if they had allowed the fence to become completely buried, thus leaving ingress so completely open as to amount to permission to enter.

In the spring gun cases, it was held that the only defence to an action by an injured trespasser was proof of notice to him of the danger. It is true that there was in those cases an element of intent which on first impression may be said to differentiate them from a case of mere negligence, but ought the law to treat extreme and reckless negligence as so different from intent as to deny all right of action even to a child who trespasses in ignorance? In the common law the fundamental distinction is not between intent and negligence, but between trespass and case. In the former the act of the defendant is of itself actionable, but in the latter, as a general rule the wrong is only actionable if the defendant as a reasonable man ought to have foreseen the probability, or at least the grave risk, of his action harming some other person or one of a class of persons, and it is noteworthy that in all three of the well-known cases of *Ilott* v. *Wilkes* (1), *Bird* v. *Holbrook* (2), and *Deane* v. *Clayton* (3), the action was in case, not trespass. The only other observation I would make is that, if in *Lynch* v. *Nurdin* (4) the act of the child playing with the unattended horse was not a nova causa interveniens which interrupted the operation of the defendant's negligence, so here the spontaneous and natural act of the young boys in running after their ball was no break in the chain of causation between the neglect of the military to maintain their preventive barrier and the damage from the mine.

I am very sensible of the difficulty of the case, but, if an occupier has to keep artificial water in at his peril, I do not see why on principle he should not be called on to take all reasonable precautions to keep children out of a place where he knows they will be blown up. Our common law rules were evolved before the age of high explosives, and I cannot think that the flat denial to the child trespasser in the present case of all right of recovery is consonant with the principles which underlie those rules. I give this judgment with diffidence and hope that there may be an appeal.

(1) 3 B. & Ald. 304.
(2) 4 Bing. 628.
(3) (1817) 7 Taunt. 489.
(4) (1841) 1 Q. B. 29.

The other issue in the appeal depends on the true interpretation of s. 3 of the Personal Injuries (Emergency Provisions) Act, 1939. It was urged for the plaintiffs that s. 3 had no application unless a scheme had been made under s. 1. I do not think so. Section 3 is quite independent of s. 1. In my view, these two actions would be barred by sub-s. 1 of that section if the death and injuries caused to the two boys were "war injuries" as defined by s. 8, which, leaving out immaterial words, defined them as injuries "caused by . . . the use of "(inter alia) any . . . . explosive . . . . either by the enemy "or in combating the enemy or in repelling an imagined "attack by the enemy." The Solicitor-General submitted that it is impossible to put any limit on the phrase "in "combating the enemy" as long as the war is continuing and the minefield is kept in existence. Had that been the intention of Parliament it would have sufficed to enact the first seven lines of para. (*a*) in the definition of war injuries, with the addition of "either by the enemy or by His Majesty's "Forces for the purpose of the war." The exegetic words "in "combating the enemy, etc." are also words of limitation. They seem to me to import active fighting, but, if they be ambiguous, the alternative about repelling unreal but supposed attacks seems to me to make it clear that they relate to the risks of an actual or imagined engagement. I cannot think it was the intention of Parliament to take away a civilian's right of action in such a case as the present, and on ordinary principles of statute interpretation the fundamental right of the subject of coming to the King's courts for redress of wrongs should not be treated as taken away by Parliament except by quite clear language. Unless the definition is limited in the way I suggest I cannot see where else to draw the line, and the very fact that Parliament has not made the deprivation of the civilian's rights dependent on the making of a scheme for an equivalent right of compensation under s. 1 affords a strong confirmation of the limited interpretation of s. 3, with its careful definition in s. 8.

For the above reasons I reject the statutory defence and think the appeal should be allowed, with costs here and below, and judgment entered for the respective sums provisionally found by the learned judge, but my brethren disagree with my view of the common law position, and the order of the court will be as they direct.

MACKINNON L.J. (read by Morton J.): I think the learned judge arrived at the right conclusion, though I prefer to rest my decision on a different ground from that on which he relied. The War Office, or the Royal Engineers, in fact took possession of this region of sandhills, and by February, 1942, had laid a minefield in it. Much time was spent in discussing before us what was the precise number in the Defence Regulations under which such possession was taken. This discussion appeared, and appears, to me to be unnecessary and irrelevant. There is no doubt whatever that possession had been taken in fact. Whether the clerk who served some notice on the owners of the land used one form or another—possibly even a wrong and inappropriate form—might be material on some question as to the rights of the owners, or the liability of the Army authorities to those owners. As between the parties to this litigation it is sufficient that the Army authorities had, in fact, taken possession, and were in possession, on August 8, 1942.

In happier times of peace these sand dunes were obviously a place where people walked about and young people played. When it had been, or was being, made dangerous by the mines, in order to prevent people straying on to it the military erected a barbed wire barrier, and at intervals of a hundred yards erected notice boards of warning. The barbed wire fence, when first erected, was composed of three rolls of wire, 6 ft. high and 6 ft. wide on the bottom. In these circumstances anyone, whatever his or her age, who got inside the fence, would be a trespasser, and, if damaged by a mine, would be a trespasser adequately protected and warned who could have no claim against anyone for damages for his or her injury; but on August 8, 1942, the fence and the notice boards were not all along in the condition described above. Owing to the blowing of the sand a hillock had been created at one point along the line of the fence which for fifteen yards had buried the lower part of the fence, so that only fifteen ins. of the wire were visible above the top of the hillock. Obviously to left and right of these fifteen yards as the sides of the hillock sloped down the top of the wire fence could be seen joining on to the top of the 6 ft. fence where the sand had not covered its base. The notice boards were all in position, but the one of them opposite the fifteen yards of hillock had been almost entirely buried, and of legible notice boards one was a hundred yards to the left, and the other a hundred yards to the right of this fifteen yards hillock. The boys got inside the fence at this point by stepping over the wire fifteen ins. high.

When the boys got inside the enclosure I think they were clearly trespassers, and prima facie a trespasser can have no claim against the owner or occupier of land for damage sustained by him from any dangerous thing on the land. There is, no doubt, an exception to this rule. The owner or occupier of land may be liable to a trespasser, especially a youthful trespasser, in respect of damage to him. *Cooke* v. *Midland Great Western Railway of Ireland* (1) is the best-known example. This exceptional liability arises when the owner or occupier has by his conduct tacitly elevated the intruder from the status of trespasser to the status of licensee. The principle is, I think, accurately stated in Salmond on Torts, 9th ed, p. 534, as follows :—" Where, however, an occupier " habitually and knowingly acquiesces in the trespasses of " children these children cease to be trespassers and become " licensees, and the occupier owes to them a certain duty of " care and protection accordingly." The matter is discussed with his usual lucidity by Scrutton L.J. in *Hardy* v. *Central London Railway Co.* (2).

To invoke that principle the plaintiffs here would have to give evidence that the defendant (or those whom he represents) had been made aware of the practice of youths like these to enter on this land and had by his conduct tacitly indicated that he did not object to the practice—in short, that he had tacitly given his licence to the intruders so to enter. I can find no evidence at all that the defendant, or his fellow officers, ever assented to, or condoned, or permitted such intrusion, so as to confer on the intruders the status or privilege of licensees.

In the result, I think the plaintiffs failed to establish any reason why these unfortunate young trespassers should enjoy any higher right than mere trespassers, and this appeal must fail. The learned judge based his decision on the effect of the Act of 1939. The reasons I have given for supporting his judgment make it unnecessary for me to embark on the question whether the learned judge was right in deciding the case on that ground. I have not formed, and I do not desire to express, any opinion on it.

MORTON J. The evidence establishes that, before August 8, 1942, the military authorities had taken possession of the land

(1) [1909] A. C. 229.

(2) [1920] 3 K. B. 459, 472, 473.

C. A.

1944

ADAMS
v.
NAYLOR.

Morton J.

whereon the explosion took place. It is true that the only notice given to the owners of the land was a notice of an intention to do work on the land under Defence Regulation 50, but the military authorities effectively took possession of the land by laying mines on it and surrounding it with a barbed wire fence, and I do not doubt that when the explosion took place they were in a position to maintain an action of trespass against intruders. Prima facie, Frank Smith and Robert Adams were trespassers. Are there any facts justifying the court in treating them as being either invitees or licensees? I can find no implied invitation to the boys to come on this land. No attractive object was placed on the minefield which could entice them to come on it: cf. *Cooke* v. *Midland Great Western Railway of Ireland* (1). They went on it in pursuit of their tennis ball which they had kicked beyond the fence. Nor do I think that there was any tacit permission to the boys, such as would alter their status from that of trespassers to that of licensees. The military authorities started by erecting a thick and forbidding barbed wire fence all round the minefield and erecting warning notice boards every hundred yards. Later, they caused warnings to be given to children attending schools in the neighbourhood. It is true that for about fifteen yards, including the spot where the boys entered the minefield, only one strand of wire was visible about twelve to fifteen ins. above the ground on August 8, 1942. It is also true that the notice board at that point was almost submerged in the sand and there was no writing on the portion which was visible. Having regard to the other facts in the case I cannot regard these facts as amounting to a tacit permission. Further, I cannot doubt that the boys knew perfectly well, when they pursued the ball, that they were going on forbidden ground. On either side of the fifteen yards stretch which I have mentioned the level of the sand became gradually lower so that more and more of the fence was revealed, and some twenty-five yards away on each side the fence was visible to its full height of nearly 6 ft. There were red notice boards at intervals along the fence with an impressive warning on them, although the notice board at the point where the boys entered had been submerged in the sand. The boys had been playing on the sandhills for some time before the accident occurred. They had been there on previous occasions. They must have seen this high thick wire fence stretching along on both sides of their point of entry though it was neither high nor thick at that point, and warnings had been given at their schools. I strongly suspect that they knew the fence was there to shut off a minefield, and I gather from the judgment of Cassels J. that he took this view, notwithstanding the denials of Robert and Charles Adams in the witness box. However that may be, I am sure they knew that the fence was put there with the intention of keeping them out, but they took the risk of crossing it because their ball was precious to them. Tennis balls are hard to obtain in these days. In my view, no permission can be implied in this case and the boys cannot be regarded as licensees. According to my understanding of the law, they must have been invitees or licensees or trespassers. There is no fourth class in which they might be placed. Thinking, as I do, that they were not invitees or licensees, I see no escape from the conclusion that they were trespassers.

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(1) [1909] A. C. 229.

In these circumstances can the plaintiffs recover damages in these actions? In *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1) Lord Hailsham said: "There are three categories in "which persons visiting premises belonging to another person "may fall; they may go (1.) By the invitation, express or "implied, of the occupier; (2.) With the leave and licence of "the occupier, and (3.) As trespassers. It was suggested in "argument that there was a fourth category of persons who "were not on the premises with the leave or licence of the "occupier, but who were not pure trespassers. I cannot "find any foundation for this suggestion either in English "or Scotch law, and I do not think that the category exists." Lord Hailsham then went on to deal with the duty which was owed by the occupier of premises to invitees and licensees, and he proceeded: "Towards the trespasser the occupier "has no duty to take reasonable care for his protection or "even to protect him from concealed danger. The trespasser "comes on to the premises at his own risk. An occupier is "in such a case liable only where the injury is due to some "wilful act involving something more than the absence of "reasonable care. There must be some act done with the "deliberate intention of doing harm to the trespasser, or at "least some act done with reckless disregard of the presence "of the trespasser." In the same case Viscount Dunedin said: "On the duty to trespassers there is a considerable body of "authority. There is no duty, save only that of not inflicting "malicious injury."(2)

(1) [1929] A. C. 358, 364, 365. (2) Ibid. p. 373.

C. A.
1944
Adams v Naylor.
Morton J.

In my view these boys had no higher right against the occupier than they would have had if they had been trespassing adults. The courts have been very ready to find in the case of children that there have been such acts or omissions on the part of the occupier as amount to a tacit invitation or licence, but, if the facts do not warrant such a finding and the child must be regarded as a trespasser, his position is defined in the passages which I have just quoted. As Viscount Dunedin said in the same case: "The truth is that in cases of trespass " there can be no difference in the case of children and adults, " because if there is no duty to take care that cannot vary " according to who is the trespasser."(1)

The case before us is a hard case, and there is much to be said for applying a rule that, if an occupier of land places deadly mines in it, however good his motive may be, and if he knows that children play on the adjoining land, he owes a duty to those children, not merely to warn them, but to render their entry on the land impossible. Children at play are always likely to trespass. However much they may be warned to keep out, they will, I think, disregard any warning of hidden dangers if they are strongly moved by curiosity or by the desire to recover a plaything. The creation of minefields in England is something new, and children need protection against their tendency to stray wherever their impulse leads them. The military authorities knew that children frequented the sandhills adjoining the minefield, and it might be said that it was their duty to make it impossible for children to enter. If they were under such a duty they certainly did not fulfil it. It would have been possible, by daily inspection, and by digging or adding to the wire where necessary, to keep this fence in such a condition that a child could not pass through it. No doubt, this would have entailed some interruption of other military duties, but it could have been done in August, 1942. On the other hand, it is obvious that a situation might arise in which a fence round the minefield would defeat the whole object with which the minefield was laid. In my view, however, the rule which I have outlined does not form part of the law of England. Even if one disregards the difficulty of applying such a rule to a time of national emergency and disregards also the fact that this minefield was laid with the praiseworthy motive of protecting this country, such a rule would involve the creation of a fourth class, coming between

(1) [1929] A. C. 376.

licensees and trespassers, of persons who, though not licensees, must be effectively prevented from becoming trespassers. I do not believe that such a class is recognised by the law, apart from cases such as *Bird* v. *Holbrook* (1), where a trap was set with the intention of injuring trespassers. I think that the cases in which a remedy has been granted to children injured when straying on another's land have been either cases in which, on the facts, the court was able to hold that the children must be treated as invitees or licensees or cases in which a dangerous act was done with reckless disregard of the presence of trespassing children at the time: see, for instance, *Excelsior Wire Rope Co.* v. *Callan* (2), and *Mourton* v. *Poulter* (3). The present case does not fall under either of these descriptions. It is much to be regretted that these boys were not prevented from following their ball on to the minefield. In my view, however, having regard to the unenviable position of a trespasser at common law, the plaintiffs in these actions cannot succeed. Despite the admirable argument of Miss Heilbron I agree with MacKinnon L.J. that the appeal must be dismissed.

Cassels J., though he was very much inclined to think that the boys were trespassers, based his judgment on s. 3 of the Personal Injuries (Emergency Provisions) Act, 1939. On this branch of the case I cannot agree with Cassels J., and I accept the view of Scott L.J. as to the interpretation of that Act. In one sense the engineers who laid these mines along the coast were combating the enemy as the mines were placed there with the intention of preventing the enemy from invading this country and of killing him if he did land on our shores. If the words were interpreted in this sense, it might well be held that a person who performs the vital work of filling a shell at a factory is "combating" the enemy. Such a person is certainly doing work directed to killing the enemy and protecting this country. This is not, however, in my view, the sense in which these words are used in the Act. Having regard to the context, I think that in this Act these words, so far as land operations are concerned, can only apply to a situation arising from the actual presence of an enemy on the soil of this country. Different considerations may well arise in the case of operations at sea or in the air. Putting the matter at its highest in favour of the defendants, the words

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(1) 4 Bing. 628.

(2) [1930] A. C. 404.

(3) [1930] 2 K. B. 183.

C. A.
1944
Adams
v.
Naylor.
Morton J.

are ambiguous, and I agree with Scott L.J. that a fundamental right of the subject should not be treated as having been taken away by statute unless the language used clearly has that effect. I should have been in favour of allowing the appeal, if this had been the only ground of defence.

Appeal dismissed.

Solicitors for plaintiffs: *Silverman & Livermore, Liverpool.*
Solicitor for defendant: *Treasury Solicitor.*

A. W. G.

END OF VOL. AND OF KING'S BENCH SERIES FOR 1944.